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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 487

ATLANTIC COAST LINE RAILROAD COMPANY, AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DOING BUSINESS AS CLINCHFIELD RAILROAD COMPANY,

Petitioners,

vs.

DOCK L. MEEKS, BY NEXT FRIEND, ADA FONEY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, EASTERN SECTION SITTING AT KNOXVILLE, TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

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vs.

DOCK L. MEEKS, BY NEXT FRIEND, ADA FONEY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, EASTERN SECTION SITTING AT KNOXVILLE, TENNESSEE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, doing business as Clinchfield Railroad Company, the above-named Petitioners, and respectfully petition this Honorable Court to grant Writ of Certiorari to review the decision and judgment of the Court of Appeals of Tennessee, Eastern Section, sitting at Knoxville, Tennessee, the decision and judgment having been rendered and entered on July 9, 1947 (R. 82; R. 93),

in the case lately pending in said Court of Appeals of Tennessee, Eastern Section, styled Atlantic Coast Line Railroad Company, et al., Plaintiffs-in-Error, vs. Dock L. Meeks, Defendant-in-Error, being Law Cause Number 2 of Causes on the docket of said Appeals Court of Tennessee, Eastern Division, affirming the judgment of $15,000.00 and costs, including interest, of the Johnson City, Tennessee Law Court in said cause, in favor of Respondent and against the Petitioners herein, which said decision and judgment of the Appeals Court of Tennessee, Eastern Section, became final on the 3rd day of October, 1947, the date of the decision of the Supreme Court of Tennessee, or October 6, 1947, the date of the Order of said Court putting its Opinion into effect denying Petitioners' application for the Writ of Certiorari (R. 95).

The judgment of the Supreme Court of Tennessee on its decision denying Petitioners' application for the Writ of Certiorari was rendered and entered on October 6, 1947 (R. 100).

The method followed in seeking a review of a decision of the Appeals Court of Tennessee is by sworn petition filed in the Supreme Court of Tennessee, together with assignments of error and supporting brief (Volume 6, Williams Tennessee Code Annotated, Section 10629).

The decision of the Court of Appeals of Tennessee, on July 9, 1947 (R. 82), and the judgment rendered pursuant thereto on the same date (R. 93) are now sought to be reviewed by Certiorari. They present questions under the Federal Employers' Liability Act of Congress, not heretofore passed upon by this Honorable Court so far as Petitioners have been able to ascertain, which the Tennessee Courts decided adversely to the Federal Act as Petitioners verily believe.

Decisions and Judgments of the Court Below

The entire decision of the Court of Appeals appears on pages 82 to 93 of the Record filed herewith. The decision of the Supreme Court of Tennessee denying the Writ of Certiorari and thereby refusing to take jurisdiction of the case appears on pages 95 and 100 of the Record.

Respondent's alleged cause of action is based on the Federal Employers' Liability Act. Petitioners believe that the relation of employer and employee did not exist between Respondent and Petitioners at the time Respondent was injured and that, therefore, Respondent's alleged cause of action is not within the purview of the Federal Employers' Liability Act. Petitioners insist that an examination of the opinions of the Court of Appeals of Tennessee and the Supreme Court of Tennessee will show that these Courts, in holding that Respondent was within the purview of the Act at the time of his injuries, judicially extended the coverage of said Act beyond its meaning and contrary to Federal decisions and Federal policy, thereby depriving Petitioners of their rights under said Federal Employers Liability Act, the injustices of which can now be corrected only on review by the Court to whom this petition for Writ of Certiorari is addressed.

Nature of Case and Summary Statement of the Matter Involved

This is an action at law under the Federal Employers' Liability Act (Title 45, U. S. C. A., Section 51, et seq.; Act of April 22, 1908, C. 149, Section 1, 35 Stat. 65; et seq., August 11, 1939, C. 685, Section 1, 53 Stat. 1404, et seq., 3565 et seq.), instituted by Respondent against Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, doing business as Clinchfield Rail-

road Company (Petitioners) to recover damages for injuries sustained by Respondent around 10:30 at night on January 4, 1946 (R. 14). On this occasion Respondent sustained burns in a bunk car belonging to Petitioners and located on one of their railroad tracks in Johnson City, Tennessee. The burns were sustained by reason of an ignited torch being thrown by one Angelo Jackson on the body of Respondent immediately following the explosion of the torch (R. 13-14).

Respondent first sued the Petitioners on July 2, 1946, for these injuries under the Workmen's Compensation Law of Tennessee, claiming permanent, partial disability (R. 3-5).

Petitioners denied liability on the Workmen's Compensation suit by answer filed August 12, 1946 (R. 6-8).

On September 6, 1946, Respondent filed his Declaration, basing his cause of action on the Federal Employers' Liability Act, claiming damages in the amount of $25,000.00. In this suit he claimed that his injuries were permanent and total (R. 13, 16).

Petitioners filed plea of former suit pending to the Federal Employers' Liability suit, insisting that Respondent should be required to elect which suit he would try first (R. 17), but upon motion of the Respondent this plea was dismissed (R. 18).

After Petitioners' special plea of former suit pending was dismissed, Petitioners then filed a plea of the general issue (R. 16).

The two suits, viz, the Workmen's Compensation suit and the Federal Employers' Liability suit, were tried together over objection of Petitioners, at the November, 1946 term of the Law Court in Johnson City, Tennessee (R. 31, 32, and 48).

At the conclusion of all the proof, and in over-ruling Petitioners' motion for directed verdict, the Trial Court held: "That this litigation should be proceeded with under the Interstate Commerce Act", meaning the Federal Employers' Liability Act; hence the case was submitted to the jury as a claim based on the Federal Employers' Liability Act (R. 71).

The Jury rendered a verdict in favor of Respondent for $15,000.00 (R. 80). Judgment was rendered against the Petitioners in the amount of $15,000.00 on the verdict (R. 19-20).

Allegations in Respondent's Petition in Compensation Case

It is averred that Respondent was employed by Petitioners to work on the Railroad as a section hand, and that on January 4, 1946, at approximately 10:00 P. M., Respondent was getting ready to retire in a camp car when a torch which was being filled by Angelo Jackson exploded; that the torch was being filled with an explosive liquid; that the liquid ignited the torch and Jackson threw the ignited torch on Respondent and burned him severely "on the lower abdomen, thigh, penis and scrotum"; that as a result of the burns Respondent was confined to his bed "and the wounds are not completely healed"; that Respondent has been totally disabled and he is advised that this condition will continue for some time in the future "and that he will suffer permanent partial disability by reason of the scars and drawing of his muscles;" that Respondent's injuries occurred "in bunk cars which were provided by the Defendant Railroad Company and in which the Defendant Railroad Company required the section hands to sleep, and said injuries arose out of and in the course of his employment;" that at the time of the injuries, Respondent was making a weekly wage of $52.50 per week and "he is en-

titled to full compensation as provided by the Workmen's Compensation Act of the State of Tennessee" (R. 3-5).

Petitioners' Answer to Workmen's Compensation Suit

The Answer of the Petitioners to the Compensation suit denied that Respondent was entitled to recover under the Workmen's Compensation Law. The answer admitted that Respondent sustained the injuries on account of burns on the night of January 4, 1946, but denied that such injuries arose out of and in the course of his employment. The answer stated, among other things, that *"Defendants deny that Petitioner was working for them or either of them at the time he sustained his injuries. Petitioner was released from work on Thursday January 3, 1946, at 6:00 o'clock P. M. and did not sustain his injuries until the following night, or January 4, 1946, as shown in the Petition"* (R. 6, 7). (Emphasis ours.)

Declaration Based on Federal Employers' Liability Act

The descriptive portions of the Declaration relating to Respondent's injuries and the date and circumstances under which they occurred are practically the same as those set forth in his petition under the Workmen's Compensation Act. The acts of negligence charged in the Declaration are: (a) Petitioners furnished a defective torch or lamp to illuminate the bunk car in which Respondent was injured; (b) Angelo Jackson, fellow employee of Respondent, was negligent in filling the lamp or torch while said torch or lamp was burning, and in throwing it against Respondent; (c) The Petitioners were negligent in not having the lamp or torch lighted by an expert; (d) Petitioners were negligent in furnishing to the employees an explosive and highly-inflammable material or fluid for use in the lamp or torch; (e) Petitioners were negligent in not providing

for Respondent a place to wait and sleep in which he would be safe (R. 15, 16).

Respondent is the only witness who testified as to the facts leading up to and surrounding the accident and resulting injuries.

For a thorough understanding of the facts and circumstances surrounding Respondent's injuries, and his relationship to the Petitioners at the time of said injuries, and to show the errors of the Court of Appeals and Supreme Court in holding that Respondent was covered by the Federal Employers' Liability Act at the time he was injured, the Court's attention is called to the following facts:

Respondent began working for Petitioners as a section hand on what he described as the "extra gang" in either September or October, 1945, at Starnes, Virginia (R. 42, 56). He lived, along with the other members of his group, in shanty cars. Shanty cars are railroad boxcars with bunks in them (R. 43). He, and the members of his group, worked on the railroad tracks of Petitioners from Erwin, Tennessee to Dante, Virginia (R. 43). These shanty cars were, of course, furnished by the Petitioners, but Respondent, as well as the other members of his group, paid for their own food and furnished their own bed clothes (R. 60). These cars had lamps for illumination purposes, but the employees likewise paid for the globes used in the lamps (R. 61).

Respondent was laid off from his work for the week on Thursday, around 6:00 P. M. and was not to return to work until Monday, January 7, 1946. The calendar will show that the Thursday on which he was laid off was January 3, 1946. On Friday morning (January 4, 1946) he caught a bus in Johnson City to Erwin to procure his pay check (R. 56). He went with another boy to Erwin on January 4 (R. 45). He wanted his check so that he could return to Johnson

City and do some shopping before catching the 11:00 o'clock train for his home in Union Hill, North Carolina (R. 40-45). After procuring his check he did some shopping in one of the stores in Erwin where the check was cashed, and the train which he expected to ride to his home pulled out while he was engaged in shopping. He stated that he told his boss "I am going back to Erwin to do a little shopping and sleep in the shanty car tonight," and his boss replied, "All right" (R. 45). Gus Dober was his boss (R. 58). Mr. Dober caught the Erwin morning train for his home after giving Respondent his check (R. 58). After spending the day in Erwin shopping, and visiting the home of his friend, Dan Lyon, a colored boy who lives in Erwin, he returned to Johnson City by bus around 5:00 o'clock on Friday afternoon (R. 45, 59). Angelo Jackson, Pat Sellers and Dan Lyon returned to Johnson City with him (R. 59). Upon returning to Johnson City all of them went to a moving picture show where they remained until around 9:30 P. M. (R. 45, 60). After getting out of the picture show, Sellers, Jackson and Respondent returned to the shanty car around 10:30 P. M., having lost the Lyon boy in the movie (R. 45, 60). After returning to the shanty car they found that there was no light in one end of this car. Respondent struck a match to light what he described as a flambeau (R. 45). A flambeau is a can to which is attached a "long snout" with a wick on it. The snout has a handle on it (R. 46). The flambeau was furnished by the Petitioners (R. 46). After Respondent lit the wick on the flambeau "there was a little blue blaze up there. It was about to go out." Angelo then procured a quart can of oil which was in the car and "started to pour it in that flambeau. It exploded, it blazed up, exploded. He throwed it down to get rid of it, and it bounced upon me" (R. 46). The flame from the flambeau burned Respondent through his clothing and he was immediately taken to the Appalachian Hospital

(R. 47, 48). The fluid which was used by Angelo to fill the flambeau smelled like gasoline instead of kerosense (R. 47).

Sullins, Simmons, Jackson and Copeny, members of Respondent's group, stayed in the shanty cars on the night Respondent sustained his injuries (R. 50-51).

Respondent intended to go to his home on Saturday morning and return to Johnson City by train on the following Sunday so that he could return to work on the following Monday morning (R. 51). Petitioners furnished free transportation on their trains to their employees to go to their homes and return on week ends (R. 50).

According to Respondent, the Petitioners did not object to the members of their section crew staying in the shanty cars over the week ends if they so desired.

In reply to a question on direct examination he stated:

"A. . . . We could stay up there if we wanted to.
Q. Usually, though, you went home?" (R. 51)

The shanty cars of Petitioners at the time of Respondent's injuries were located on their tracks near the new post office in Johnson City (R. 52). The last work, however, was done by the members of the crew before they were laid off on Thursday January 3, 1946, near the Soldiers Home in Johnson City (R. 55).

Respondent made fifty-five cents an hour while working forty hours per week (R. 51).

He was told by some of the members of his crew that he was subject to call in the event of an emergency at any time, although his boss did not so advise him (R. 54).

He stated that he was also told that he had to live in the shanty cars while working for the defendants (R. 52).

He further stated that at the time he was laid off from work on Thursday, January 3, 1946, he expected to return

to work on Monday, January 7, 1946. These are his answers to questions on direct examination:

Mr. Bralley:

"Q. Well, did you expect to go back to work Monday?

A. Yes, sir.

Q. And you were going to assume your duties?

A. Yes, sir" (R. 54).

The members of Respondent's group worked on January 1, 1946, so that they could close their work on Thursday, January 3, 1946 (R. 64). Respondent so stated as follows:

"Q. You worked on January 1, the holiday?

A. Yes, sir.

Q. So that you could close your work on Thursday that week?

A. Yes, sir.

Q. And from the time you got off at six o'clock on Thursday of that week——

A. Yes.

Q. ——you never worked on the tracks or did any work on the tracks?

A. No, sir.

Q. Now, you were coming back to work——

A. Monday morning.

Q. ——on Monday?

A. I mean on Sunday.

Q. But you were going to start work again on the tracks on Monday?

A. Monday is right; yes, sir" (R. 64).

Respondent repeated the statement that he was told that he could stay in the shanty cars if he wanted to. The following are his answers to questions on redirect examination:

Mr. Bralley:

"Q. You say you were told you could stay in these cars if you wanted to?

A. Yes, sir.

Q. Some other men, to your knowledge, stayed over the week end?

A. Yes, sir; they stayed.

Q. You were going back to work Monday morning?

A. Yes, sir, I was going home on Saturday, coming back Sunday, be there Monday" (R. 66).

Many of the employees of Respondent's group caught train No. 38 of the Petitioner's on Friday morning, January 4, to go to their homes in North and South Carolina (R. 56). Mr. Dober, the boss of the entire group, left on this train for his home (R. 66).

There were around seventeen people in Respondent's group and all of them, including Gus Dober, the foreman of the group, except five left Johnson City for their respective homes on Friday January 4, 1946 (R. 66).

Summary of Holding of Court of Appeals

The Court of Appeals held:

(a) That there was material evidence presented to the jury wherein they could find that the relation of employer and employee or master and servant existed between the parties at the time of the injury (C. A. Opinion, R. 87).

(b) That although Respondent was not working at the time of his injury he was engaged in matters incident to his employment and therefore covered by the Federal Employers' Liability Act (C. A. Opinion, R. 90).

(c) That the action of the trial court in trying the Workmen's Compensation case and the Federal Employers' Liability case together was proper (C. A. Opinion, R. 92).

Summary of Holding of Supreme Court Opinion Denying Application for Writ of Certiorari and Refusing to Take Jurisdiction of the Case.

The learned Supreme Court held:

That Respondent was an employee of Petitioners at the time of his injury and was engaged in acts incidental to his employment (Sup. Ct. Opinion, R. 99).

The reasons given by the Supreme Court for holding that Respondent was engaged in acts incidental to his employment at the time of his injury were:

(1) That he was injured on the premises of Petitioners and subject to Petitioners' control, where he had a contractual right to be and receive a benefit, namely, a place to sleep.

(2) He was injured by an instrument furnished by the Petitioners, and the risk arose by reason of the peculiar conditions of the employment imposed by the Petitioners.

(3) And he was subject to call at any time in case of an emergency or for extra repairs on the tracks of the Petitioners (Sup. Ct. Opn., R. 99).

Jurisdiction of This Court

The jurisdiction of this Court is based upon Section 237 of the Judicial Code as last amended by the Act of February 13, 1925; Chapter 225, Section 1, 43 Stat. 937, Title 28, U. S. C. A. Section 344, providing that it shall be competent for this Court, by Certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like affect as if brought up by Writ of Error, any cause wherein a final judgment or decree has been rendered by the highest Court of a State, in which a decision could be had on any title, right, privilege or immunity especially set up or claimed

by either party under the Constitution, or any treaty or statute, or commission held or authority exercised under the United States.

As stated hereinbefore, the judgment of the Court of Appeals of Tennessee sought to be reviewed was entered on July 9, 1947 (R. 82, 93).

Petitioners in due course applied to the Supreme Court of Tennessee for the Writ of Certiorari to have reviewed the decision of the Court of Appeals of Tennessee, and by written opinion, filed October 3, 1947 (R. 95), and judgment entered and filed on October 6, 1947 (R. 100), the Supreme Court of Tennessee denied Petitioners' application for such writ. The Supreme Court of Tennessee thus refused to take jurisdiction of the case. The Court of Appeals of Tennessee was the highest Court of the State in which a decision could be had in the cause, since the Supreme Court of Tennessee refused to take jurisdiction of said cause.

Petitioners endeavored to have the Supreme Court of Tennessee take jurisdiction of the cause by filing a petition for Certiorari, assignments of error, and supporting brief in that Court (R. 108-121). This was the only method open to them to have the decision of the Court of Appeals reviewed by the highest court of Tennessee (Vol. 6, Williams Tennessee Code Annotated, Sect. 10629).

Petitioners set up and claimed in the cause in both the Court of Appeals of Tennessee and the Supreme Court of Tennessee that they were deprived of a right or an immunity under a statute of the United States, namely the Federal Employers' Liability Act (45 U. S. C. A., Section 51, Act of April 22, 1908, Chapter 149, Section 8, 35 Stat. 65), (R. 101-108; 108-121); which claim, right and immunity were denied Petitioners by the Court of Appeals of Tennessee (R. 82-93).

Cases believed to sustain the jurisdiction are:

Brady v. *Southern Railway Company,* 320 U. S. 476, 88 Law Ed. 239;

Ellis v. *Union Pacific Railroad Company* (decided February 3, 1947) 91 Law. Ed. 433 (Law Edition Advance Opinions February 24, 1947 issue);

Blair v. *Baltimore and Ohio Railroad Company,* 323 U. S. 600, 65 Supreme Court Report 545, 89, Law Ed. 490;

American Railway Express Company v. *Levee,* 263 U. S. 19; 68 Law Ed. 140.

Questions Presented

The questions presented by Petitioners' petition herein for a Writ of Certiorari are:

(1) Whether Respondent was employed in Interstate Commerce by Petitioners at the time he was injured on January 4, 1946, around 10:30 P. M., approximately twenty-eight and one half hours after Respondent's work had ended, within the purview of the Federal Employers' Liability Act (45 U. S. C. A., Section 51, Act of April 22, 1908 c. 149 Section 1, Stat. 65).

(2) Whether Respondent, at the time of said injuries, was engaged in acts incidental to employment by Petitioners in interstate commerce within the meaning of the Federal Employers' Liability Act.

(3) Whether Angelo Jackson, the person who threw the torch on the body of Respondent, causing said injuries, was an employee of Petitioners in interstate commerce within the meaning of the Federal Employers' Liability Act at the time he threw said torch.

(4) Whether the trial of the Workmen's Compensation case under the Tennessee Workmen's Compensation Law and the Federal Employers' Liability case together vio-

lated Petitioners' rights under the Federal Employers Liability Act.

Reasons Relied On for the Allowance of the Writ

I

This action is brought by Respondent under the Federal Employers' Liability Act, section 1 of which is as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Section 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Section 1, 53 Stat. 1404."
>
> 45 U. S. C. A., S. 51, p. 118.

Neither the term "employer" nor the term "employee" is defined in the Act, but these terms are to be considered as having been used in the Act in their ordinary and natural sense, and according to common law principles as applied to the relationship of master and servant.

Robinson v. *B. & O. R. R. Co.,* 237 U. S. 84, 59 Law Ed., 849;

Bourne v. *Southern Railway* (Supreme Court of N. C., Mar. 7, 1945) 225 N. C. 43; 33 S. E. 2nd 239; 35 Am. Jur. Sec. 432, p. 849.

There is no dispute as to the facts in this case and the question as to whether or not Respondent was an employee of the Petitioners within the purview of the Federal Employers' Liability Act at the time of his injuries, is one of law.

Phila. & Reading Ry. Co. v. *Hancock,* 253 U. S. 284, 64 Law Ed., 907.

The essential and final test in determining whether the master-servant relationship exists, under common law principles, is whether or not the master has the right to control the servant on the occasion under investigation.

35 Amer. Jur. Section 3, page 445 et seq.

As pointed out and set forth in the "Summary Statement of Matters Involved," the work week of Respondent and his group was forty hours. Respondent and his group worked on January 1, 1946, which was a holiday, so that they could finish their work the first week in January, 1946 on Thursday of that week. Accordingly, Respondent and his group completed their work for Petitioners at around 6:00 P. M. Thursday, January 3, 1946, at which time the work for the entire week ended. At that time, the pay of Respondent and the other members of his group stopped.

After 6:00 o'clock P. M. on Thursday, Respondent and the other members of his group were free to go where they pleased and do what they pleased. Petitioners relinquished all control over them at that time. All of them, including their foreman Gus Dober, left their jobs. They were on their own time and not subject to any order of Petitioners. There was no one on the job representing the Petitioners to give them orders since they had broken camp and their foreman had gone, the foreman of the group and twelve members of the group having left for their respective homes on the following Friday morning, January 4, 1946. All matters transacted by Respondent and the other members of his group after they were laid off from work on Thursday were matters personal to themselves. Respondent neither owed to, nor performed any duty for Petitioners after he was laid off from work on Thursday January 3, 1946. Respondent's return to the railroad car where he was injured on Friday night, January 4, 1946 was a matter of his own convenience and of his own choice as there was no duty or obligation upon his part to so return.

The fact that he stated to his foreman, Dober, that "I am going back to Erwin to do a little shopping and sleep in the shanty car tonight," and his foreman replied 'all right," shows that it was not his practice to sleep in the cars on the week end and that when he first left Johnson City he did not plan to return to the Railroad car on the Friday night that he was injured. Neither Respondent, nor any member of his group intended to return to their jobs before the following Monday, January 7, 1946. Respondent may not have returned even if he had not been injured, though he stated that he intended to return. He could have changed his plan as there was no legal duty upon him to return.

If Respondent had failed to return to work on the following Monday morning, but continued to sleep in the railroad car for a period of six or twelve months at his own

convenience and had been injured under similar circumstances as in this case, it could not be plausibly argued that such injury would have been covered by the Federal Employers' Liability Act. The only difference in the hypothetical case and the case under consideration is the time element.

The relationship between master and servant is suspended when the servant leaves the place of his actual employment at the close of the day's work for a destination unless the incidents of his employment are exceptional.

Little v. *Johnson City F & M Company*, 158 Tennessee, p. 102.

The incidents of Respondent's employment were not exceptional as there was nothing connected with said employment which required or obligated him to return to the railroad car on the night he was injured. In fact, he was not expected to do so—such was not contemplated by the parties at the time he was employed. He was expected to go home when released over the week end, else he would not have asked permission of his foreman to remain in the railroad car.

The holdings of the Supreme Court of Tennessee that Respondent was subject to the control of Petitioners at the time he was injured; that he was subject to call in case of an emergency on the night he was injured, and that his injuries resulted from the peculiar conditions of his employment imposed by the Petitioners, are contrary to the evidence in the case.

If Respondent had been injured in the Petitioners' railroad station in Johnson City under the same circumstances as he was injured on the occasion in question, it could not be plausibly said that the master and servant relationship existed and that such injuries were within the contemplation of the Federal Employers' Liability Act. If he had

been injured while staying at a private rooming house under the same circumstances it could not be said that the master-servant relationship existed and that such injuries were within the contemplation of the Act.

It is believed that the holding of the Court of Appeals of Tennessee that Respondent's injuries were covered by the Federal Employers' Liability Act is contrary to the evidence in the case, is in contravention of Federal policy and applicable Federal decisions, and contrary to both the letter and spirit of the Federal Employers' Liability Act.

Respondent was injured in the nighttime, approximately 28½ hours after his work was suspended and if such injuries are covered by the Federal Employers' Liability Act it would seem that injuries to persons anywhere on the line of the railroad, after termination of their work, would also be covered by the Act. It is not believed that it was the intention of Congress for the Act to cover injuries to persons that occur while such persons are not on duty.

Pryor v. *Bishop*, 234 Fed. page 14; *Bishop* v. *Delano*, 265 Fed. 263; *Brwn's Admr.* v. *Norfolk & West. Ry. Co.*, 12 Fed. Rep. 2nd, p. 319.

II

On the day following the Thursday that Respondent and the other members of his group were released from work, Respondent went to Erwin, Tennessee and procured his pay check from his foreman, Dober. After procuring his pay check, he did some personal shopping in some of the Erwin stores and after completing these personal matters visited a friend, Dan Lyon, in Erwin, for a period of several hours. Upon arriving in Johnson City, around 5:00 o'clock in the afternoon, he attended a picture show in Johnson City with three of his friends. It goes without saying that all of these matters were personal to Respondent, and while engaged

in them he was his own master. His return to the railroad car around 10:30 Friday night was of his own volition and about as remote to the duties of his employment as visiting his friend in Erwin, engaging in his personal shopping in Erwin and Johnson City, and attending the picture show. He did not visit the railroad car on Friday night in order to await a call for duty by the petitioners. He was not there to protect the property of the Petitioners. He was not there to receive food, as meals were not served after the work week had closed. He was not there while momentarily off from work during the work week. He was not drawing pay while there. He was not subject to any order of the Petitioners while there. He was not injured at the place where he performed his work. He was not preparing to go to work at the time he was injured. He did not intend to return to work, according to his own statements, for four nights and three days after closing his work week on Thursday, January 3rd. If he had negligently injured some third party in the railroad car on the night he was injured, the Petitioners would not have been responsible for his acts on the theory that he was acting as a servant or agent of Petitioners. His acts at the time of his injury were no more incidental to his employment than the acts of the twelve other members of his group who had gone to their respective homes.

The line of cases which the Court of Appeals of Tennessee followed in concluding that Respondent was engaged in matters incidental to his employment at the time of his injuries, and, therefore, covered by the Federal Employers' Liability Act, is represented by the following: *Erwin* v. *Pa. Ry. Co.*, 36 F. (2d) 937; *Chicago M. St. P. & P. R. Co.* v. *Kane*, 33 F. (2d) 866; *Erie Ry. Co.* v. *Wingfield*, 224 U. S. 170, 61 Law Ed. 1057; *Sassaman* v. *Pa. Ry. Co.*, 144 F. (2d) Page 950; *Va. Ry. Co.* v *Early*, 130 F. (2d) 548.

This line of cases generally involves factual situations which fall into one of the following classifications: (1) Where the servant is actually at the place where he performs his work or is in close proximity thereto and steps aside from his work temporarily to do something incident to life and in so doing is injured. (2) Where the servant is on his way to, or coming from, the place where he actually performs his work, or is being transported to and from his work by his employer under contract. (3) Where the servant is required to remain on the premises of the employer and is subject to call by the master while on such premises. The instant case does not fall in any of these classifications.

Respondent did not return to the car on the night of his injury by reason of any duty or order of Petitioners, but solely as a matter of choice and was not subject to the control of Petitioners. It is believed that the holding of the Court of Appeals that Respondent at the time of his injury was engaged in matters incidental to his employment within the meaning of the Federal Employers' Liability Act is unsupported by the evidence in the record and in contravention of the meaning of the Federal Employers' Liability Act and the applicable Federal decisions.

III

Angelo Jackson discontinued his work with the Petitioners at the same time that Respondent's work was discontinued, namely, Thursday, January 3, 1946, at around 6:00 o'clock P. M. Hence, he was using the railroad car at the time Respondent was injured on the same basis and under the same circumstances that Respondent was using it. The use of this car by them was simply permissive on the part of the Petitioners. Since Respondent was not engaged in work for the Petitioners at the time of his injuries,

it necessarily follows that Angelo Jackson was not a fellow servant of Respondent at that time.

Reeve v. *Northern Pac. Ry. Co.* (Washington Supreme Court) 144 Pac., 63, L. R. A. 1915 C p. 37.

The holding of the Court of Appeals of Tennessee that Angelo Jackson was a fellow servant of Respondent at the time of the accident is contrary to the evidence and believed to be in conflict with applicable federal decisions.

IV

In the Workmen's Compensation case, negligence was not a necessary element and the right of action was triable by the Court alone and was based upon a State Statute and appealable to the Tennessee Supreme Court. (Vol. 4, Williams Tennessee Code, Sections 6852, 6855). The Federal Employers' Liability case was based upon alleged negligence and was triable by a Court and Jury and appealable to the Court of Appeals of Tennessee. ((Vol. 6, Williams Tenn. Code, Sec. 10618). Thus the Trial Court forced Petitioners to try a case triable before the Court without a Jury with a case triable before the Court and a Jury and each case appealable to a different Court. It is believed that the Court, in requiring Petitioners to try the two cases together, violated Petitioners' rights and immunities under the Federal Employers' Liability Act and that such action is in contravention of federal policy and federal decisions.

Prayer of Petitioners

Wherefore, Petitioners pray, that a Writ of Certiorari be issued by this Honorable Court, directed to the Court of Appeals of Tennessee, Eastern Section, sitting at Knoxville, Tennessee, to the end that the decision and judgment of the Court of Appeals of Tennessee in said cause, Atlantic Coast Line Railroad Company and Louisville and Nash-

ville Railroad Company, doing business as *Clinchfield Railroad Company, Plaintiffs-in-Error,* vs. *Dock L. Meeks,* by next friend, Ada Foney, Defendant-in-Error, Law Cause Number 2, from the Law Court at Johnson City, Tennessee be reviewed by this court, as provided by Law, and that upon such review said decision and judgment be reversed, and that Petitioners have such other, further and general relief as to this Court may seem appropriate.

Dated: December 22, 1947.

ATLANTIC COAST LINE RAILROAD COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Doing Business as Clinchfield Railroad Company,
Petitioners,

JAMES J. McLAUGHLIN,
217½ East Main Street,
Johnson City, Tennessee,
ROBERT L. TAYLOR,
217½ East Main Street,
Johnson City, Tennessee,
JAMES H. EPPS, JR.,
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COX, TAYLOR, EPPS and MILLER,
217½ East Main Street,
Johnson City, Tennessee,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 487

ATLANTIC COAST LINE RAILROAD COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DOING BUSINESS AS CLINCHFIELD RAILROAD COMPANY, *Petitioners,*

vs.

DOCK L. MEEKS, BY NEXT FRIEND, ADA FONEY, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Court Below

The opinion of the Court of Appeals of Tennessee in said cause of *Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Plaintiffs-in-Error,* vs. *Dock L. Meeks,* by next friend, Ada Foney, Defendant-in-Error, which Petitioners here seek to have reviewed is not officially reported but appears on pages 82-93 of the record filed herewith. Neither is the opinion of the Supreme Court of Tennessee, in which that Court refused to take jurisdiction of the case, reported, but appears on pages 95-100 of the record filed herewith.

Statement of the Case

The essential facts of the case are believed to be fully stated in Petitioners' petition for Writ of Certiorari, and in the interest of brevity it is not believed necessary to restate such facts herein, except by referring to them in the course of the argument which will follow.

Specifications of Error to Be Urged

The Court of Appeals of Tennessee, in its opinion in said cause, erred:

(1) In holding and deciding that there was material evidence presented to the Jury wherein the Jury could find that the relation of employer and employee or master and servant existed between Petitioners and respondent at the time of Respondent's injuries.

(2) In holding and deciding that Respondent was engaged in matters incident to his employment in interstate commerce and, therefore, covered by the Federal Employers' Liability Act.

(3) In holding and finding, in effect, that Angelo Jackson, the person who threw the torch on the body of Respondent that caused his injuries, was an employee of Petitioners in interstate commerce within the meaning of the Federal Employers' Liability Act at the time he threw said torch.

(4) In holding and finding that the action of the Trial Court in trying the Workmen's Compensation case and the Federal Employers' Liability case together was proper.

(5) In affirming the verdict of the Jury in the amount of $15,000.00 in favor of Respondent, and the judgment of the Trial Court rendered thereon.

(6) The Supreme Court of Tennessee erred in denying Petitioners' application for Writ of Certiorari and thereby

refusing to take jurisdiction of the cause and, in effect, approving the opinion of the Court of Appeals.

Summary of Argument

(1)

The evidence adduced at the trial of said cause of Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, doing business as Clinchfield Railroad Company, vs. Dock L. Meeks, by next friend Ada Foney, on the question of the relationship of the Petitioners and Respondent at the time of Respondent's injury was undisputed. Respondent was the only witness who testified on this point and the question of whether such employer-employee relationship existed at the time of the injury was a question of law for the Court and not a question for the determination of the Jury and the Court of Appeals erred in failing to hold that Respondent was not an employee of Petitioners in interstate commerce within the purview of the Federal Employers' Liability Act at the time Respondent sustained his injuries.

Phila. and Reading R. R. Co. v. *Hancock,* 253 U. S. Pages 283, 285, 64 L. Ed. pages 907, 908.

Brady v. *Southern Railway Company,* 320 U. S. 476, 479, 88 L. Ed. 239, 243.

(2)

The evidence adduced at the trial in this cause showed that Respondent was not engaged in matters incident to any employment in interstate commerce by Petitioners within the purview of the Federal Employers' Liability Act at the time of his injuries, but was engaged in matters personal to himself and that his injuries occurred many hours after the employer-employee relationship had been suspended

between him and Petitioners, and the Court of Appeals erred in failing to so hold.

Bourne v. *Southern Railway Company* (Supreme Court of N. C., decided March 7, 1945), 225 N. C. page 43, 33 Southeastern 2nd, pages 239, 241, 242.

Pryor v. *Bishop,* 234 Federal, pages 9, 14, 15;

Bishop v. *Delano,* 235 Federal, pages 263, 264;

Brown's Administrator v. *Norfolk & Western Railway Company,* 12 Federal 2nd, pages 319, 321;

Karsaik v. *Pennsylvania R. R. Co.,* 270 Fed. 758;

Brown v. *Pere Marquette Railroad Company* (Michigan Supreme Court), 213 N. W. 179, 71 A.L.R. 858-859.

35 Amer. Jur., Sect. 440, page 855;

Volume 2, 2nd Edition Roberts Federal Liabilities of carriers, Section 739, page 1401.

(3)

The evidence adduced at the trial in this cause showed that Angelo Jackson, the person who threw the torch on the body of Respondent that caused his injuries, was not a fellow-employee of Respondent in interstate commerce within the meaning of the Federal Employers' Liability Act at the time he threw said torch, and the Court of Appeals erred in failing to so hold.

Reeve v. *Northern Pacific Railroad Company* (Washington Supreme Court), 144 Pacific, page 63, L.R.A. 1915, c. page 37;

Wood, Master and Servant, Section 435.

(4)

The Court of Appeals erred in not holding that the Trial Court erred in trying the Tennessee Workmen's Compensation case and the Federal Employers' Liability case at

the same time. The Trial Court should have required Respondent to elect which of the cases he would try first, and the Court of Appeals erred in failing to so hold.

Hudgins v. *Nashville Bridge Company,* 172 Tennessee page 580.

(5)

This Court, on Certiorari, is not confined to a consideration of the evidence referred to by the State courts in their opinions, but will review the entire record and determine for itself whether Petitioners were denied a Federal right or Federal immunity by the opinions and judgments of the courts below.

G.N.R. Co. v. *State of Washington,* 300 U. S. 154, 81 L. Ed. 573;

United Gas Public Service Company v. *State of Texas,* 303 U. S. 123, 143, 82 L. Ed. 702;

Chicago, G. W. R. Co. v. *Rambo,* 298 U. S. 99, 80 L. Ed. 1066.

Argument

This is an action under the Federal Employers' Liability Act, the material part of which is cited in Petitioners' petition for Certiorari, page 16 thereof.

The portions of such Act which are pertinent to the questions under consideration are:

> "Every common carrier by railroad, while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative . . ."
>
> (45 U. S. C. A., Sect. 51, Act of April 22, 1908, C. 149, Sect. 1, 35 Stat. 65.)

The pertinent provision of the August 11, 1939 amendment to the Act is as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."
>
> (45 U. S. C. A., Section 51, August 11, 1939, Chapter 685, Section 1, 53 Stat. 1404.)

The Act does not itself define the meaning of the word "employee," or the word "employer" used in said Act, but such words have been interpreted and understood in their ordinary sense and according to their usage in the law of master and servant.

Robinson v. *B. & O. R. R. Co.*, 237 U. S. 84, 59 Lawyers' Edition 849;

35 Amer. Jur., Sect. 432, page 849.

The above-quoted portion of the 1939 amendment to the Act broadens the Federal remedy. Prior to this amendment there were many close and difficult situations from which to determine whether or not the employees' work was a part of interstate commerce at the time of his injuries, and to avoid these difficulties was one of the purposes of this amendment. (*Erwin* v. *Pa. R. R. Co.*, 36 Fed. Supp. 937, 940). Under the amendment an employee of a railroad company whose general duties are partly in intrastate commerce and partly in interstate commerce is covered by the Act if he is injured while performing such duties. Prior to the amendment, it was necessary for the employee to be

engaged in a task in interstate commerce at the time of his injuries in order to be covered by the Act.

Erie Railroad Co. v. *Welsh*, 242 U. S. 303, 61 Law. Edition 319.

Although the 1939 Amendment materially broadens the Federal remedy of the injured party, it does not make parties employees of the railroad who were not employees prior to the passage of such amendment. In order, therefore, for a person to come within the purview of the Act, as amended, it is necessary for such person to be "employed by such carrier in such commerce" at the time of his injuries, or engaged in matters incidental to his employment in interstate commerce.

I

Respondent was not injured while employed by Petitioners in interstate commerce within the purview of the Federal Employers' Liability Act, nor was respondent injured while engaged in matters incidental to employment by Petitioners in interstate commerce.

It is submitted that the Court of Appeals erred in holding that there was sufficient evidence to submit to the Jury on the question of whether or not the employer-employee relationship existed between the parties within the meaning of the Federal Employers' Liability Act at the time Respondent was injured.

The group in which Respondent was working disbanded on Thursday, January 3, 1946 to go to their homes for the week end and Respondent was not injured until Friday night around 10:30 P. M., January 4, 1946. Respondent intended to catch the Friday morning train for his home and the only apparent reason for not carrying out his purpose was his desire to return to Johnson City to do some

shopping. He was not only not required to return to Johnson City and stay in the railroad car on the night he was injured, but was not expected to so return. He had no duty to perform for Petitioners when he returned to Johnson City. It was neither his practice nor that of any other member of his group to stay in the railroad cars on the week ends, and Petitioners did not contract with them to stay in the railroad cars on the week ends. This is shown by the following portion of Respondent's testimony:

> "Q. Let me see if I understand you. You got off from work Thursday at six o'clock?
>
> A. Yes, sir. The reason I got off from work Thursday, six o'clock, we worked on—the year 1946 come in, I think that was a holiday.
>
> Mr. Taylor: That's right.
>
> The Witness: *We worked on that day, that throwed us to go home on Thursday or Friday—I mean work up to Thursday and go home on Friday. We had been going home on Saturday*" (R. 63, 64). (Emphasis ours.)

Respondent received his check on Friday morning in time to catch the train for his home. This fact is shown by the following portion of his testimony:

> "Q. Your boss man?
> A. Yes, sir, Gus Dober.
> Q. Where did he give you your checks?
> A. Down at the depot.
> Q. At the depot?
> A. Yes, sir.
> Q. In Erwin, Tennessee?
> A. That's right.
> Q. Had the train gone then?
> A. No, sir.
> Q. It hadn't gone?
> A. No, sir.
> Q. It hadn't gone?
> A. No, sir.
> Q. Did Mr. Dober go on the train?

A. Yes, sir.

Q. Gave you your check and Sellers and the other boys got their checks too?

A. Yes, sir. We told them we were going to stay in the shanty car.

Q. You told that to Mr. Dober?

A. Yes, sir.

Q. You came back from Erwin that morning how, to Johnson City?

A. Caught a bus" (R. 58).

His return to Johnson City was solely for the purpose of engaging in personal matters. This is clearly shown by his testimony as follows:

"Q. After you got your check you say you were coming back to Johnson City?

A. Yes, sir, I come back and did some shopping.

Q. To do some shopping?

A. Yes, sir, but I went to Erwin that day at that store and had my check cashed.

Q. At the Unaka Store?

A. Yes.

Q. Had your check cashed?

A. Yes, sir.

Q. Friday morning?

A. Yes, sir—not Friday morning, it was right when the train went—that's right, Friday morning" (R. 56, 57).

Respondent was not working on the night he was injured and Petitioners had no control over him; no more control than if he had been in one of their railroad stations. He was not on duty and was not doing anything for the benefit of Petitioners. He was in the railroad car on the night he was injured as a matter of choice and free from any obligation or any order of Petitioners.

Respondent was not subject to call on the night he was injured, neither was any other member of his group. He

would not have been subject to call unless and until he returned to work on the following Monday morning, January 7, 1946, if he returned at that time, any more than a third party might have been if employed for the first time on Monday morning. The fact that Petitioners did not object to Respondent staying in the railroad car on the night he was injured did not restore the employer-employee relationship within the meaning of the Federal Employers' Liability Act, after it was suspended on Thursday, January 3rd.

There must be substantial and material evidence before a case may properly be submitted to the Jury. It is submitted that there was no material evidence to submit to the Jury on the question of whether or not Respondent was employed by Petitioners in Interstate Commerce at the time of his injuries.

When the evidence is such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict, the Court should direct the verdict. A motion was made by Petitioners for a directed verdict in their favor at the conclusion of all proof, but this motion was overruled (R. 69-70).

It is respectfully submitted that the Court of Appeals committed grievous error in not reversing the action of the Trial Court on this point.

> ". . . But when a state's jury system requires the Court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury (Citing cases). When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding

by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims (Citing cases)."

Brady v. *Southern Ry. Co.* (Decided December 20, 1943), 320 U. S. 476, 479, 88 L. Ed. 239, 243.

When the essential facts are not in controversy, the relationship of the parties, within the meaning of the Federal Employers' Liability Act is a question of law.

In the case of *Philadelphia and Reading Railroad Company* v. *Hancock*, 253 U. S. page 283, 285, 64 Law Edition pages 907, 908, this Honorable Court said:

"If when the accident occurred, the husband was employed in commerce between states the challenged judgment must be reversed. And he was so employed if any of the cars in his train contained interstate freight (Citing cases). The essential facts are not in controversy; the nature of the employment therefore is a question of law."

In the case of *Pryor* v. *Bishop* (1916—Circuit Court of Appeals, Seventh Circuit), plaintiff, a member of a train crew, subject to call for an interstate trip, was injured in one of the company's cabooses, while waiting for the call for work. The Court in holding that plaintiff was not an employee of the company within the meaning of the Federal Employers' Liability Act said in part:

"Assuming that the court correctly held that the jury in the Moyse Case was justified in finding the relation of master and servant actually to exist at the time of the injury, it is to be noted that this was based upon the finding of a contractual right as well as a duty to be in the caboose at the time. Moyse was there pursuant to a definite obligation and, even though merely awaiting a call, might be held to be acting as an employee in

so occupying the caboose. In the instant case, however, there was no such duty; the deceased could as well have been at a city hotel; his only duty at the time was to be within call, either personal or telephonic. That he was on the company's property at the time of the injury was due, not to an obligation, but to a privilege, a license; in being there, he was acting, not as an employee, but as a licensee."

"If, however, he could be deemed to be in the employment of the company at the time of the injury, nevertheless he was not then actually employed in interstate commerce. His actual employment at the time was holding himself ready in the City of Chicago to respond to a call for service. That the call, when it came, would be for an interstate trip, does not make the waiting in Chicago an actual engagement in interstate commerce, within the terms of the federal act."

"Plaintiff's claim that, by the hitching on of the caboose in question to the transfer train, decedent's crew was called, and that his interstate service had thus actually begun, does not commend itself to our judgment. It was not, nor was it intended as such. Clearly the crew had not started with the caboose upon their home run. Neither does it appear from the evidence that the caboose and train crew were at the place of the injury for the benefit of defendant, or that they were wanted there at the time, or that there was any understanding that they should be at Landers at or near that time, or that they were at the place of the accident with other right than the mere sufferance of defendant, that being the most convenient way for them to get to Landers and secure sleep and other accommodations for the night, or that they were under any expectancy of a call, or that their acts in the premises had any bearing upon interstate commerce, or that the facts of the case brought the decedent within the provisions of the Federal Employers' Liability Act."

* * * * * * *

"To hold that decedent was, at the time of the injury—some 4 or 5 hours before he was wanted by defendant—employed in interstate commerce, would practically make the defendant liable to him as engaged in interstate commerce at all times. Such is not the purpose of the act. The statute was enacted only with reference to those railroad employees who, while in the actual discharge of their duties in interstate commerce, are injured."

"Pryor *v.* Bishop, 234 Fed. Rep. 9, pp. 14-15."

On a second appeal the Court again said:

"Though the defendant knew that Bordner, if he chose, might stay in the caboose during his free period, his doing so was not a requirement of his service. We see no larger ground of liability than if the defendant had permitted Bordner during his time of nonservice to sleep in a station building, and he had there been killed through the negligence of defendant's servants."

Bishop v. *Delano* (1920), 265 Fed. Rep. 263, 264.

In the case of *Brown's Adm'r* v. *Norfolk & W. Ry. Co.*, 12 Fed. Rep. 2nd, p. 319, the Court said:

"The distinction between the Krysiak Case and the Zachary Case seems to be this: After the end of the day's work the act of the employee must be a necessary incident of his work, or he is no longer employed within the meaning of the Employers' Liability Act. But, if the act of the employee occurs at a rest interval during the day's work, the status of the employee is not changed, if the act done is, in intent, not inconsistent with the employee's duty to resume his work at the appointed time. See Erie R. Co. *v.* Winfield, 244 U. S. 170, 173, 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662."

In the case of *Little* v. *Johnson City F. & M. Company*, 158 Tenn., page 102, the Tennessee Supreme Court quoted

with approval the following language from the Massachusetts Supreme Court:

> "The principle is carefully stated by the Massachusetts Court as follows:
>
> 'Unless the incidents of employment be exceptional, the relation between a master and his servant is suspended when the servant leaves the place of his actual employment at the close of his day's work to go to his home, and again becomes active when after the interval of rest, the laborer puts himself in a position where he can do the work of his employment at the place where it is to be performed. Langley *v.* Boston Elevated R. Co., 223 Mass. 492, 112 N. E. 79, Rourke, Claimant (Mass.), 129 N. E. 603, 13 A. L. R. 546.'
>
> "We see nothing in the facts of this case to take it out of the general rule. It appears that the employee was ordered to return somewhat earlier on the morning he was hurt, perhaps because of extra work, than he usually reported for duty. His relation with his employer was to be resumed on the particular day at an earlier hour than usual. Such relation, however, had not been resumed and the employee was still on the public highway when he was injured. His injury did not arise out of his employment nor in the course of his employment, but during the suspension of his employment. The employee was to work a longer time on the day he was hurt, than was his custom, and he would have gotten more pay. It seems, therefore, that his early return to work, even under the orders of the employer, was an immaterial circumstance in this case."

The Court held in the case of *Karysaik* v. *Penn. R. R. Co.*, 270 Fed. 758, that an employee working in an ash pit in railroad yards who, on leaving his work, instead of taking the stairway to the street provided by the railroad company, for his own convenience walked across the yards and tracks as other employees did, following no confined way, was

struck and killed by train on main track, had ceased his employment and was not covered by the Federal Employers' Liability Act.

In the case of *Brown* v. *Pere Marquette R. Co.* (Mich. Supreme Court), 213 N. W. 179, 71 A. L. R., 854, the Court held that a railroad brakeman asleep in the caboose of a freight train on the completion of sixteen hours continuous service, is not "on duty" within the meaning of Federal Hours of Service Act so as to entitle him to recover under the Federal Employers' Liability Act for injuries sustained when a train collides with the caboose, although he has not been relieved from duty by any order from the superintendent or train dispatcher. In so holding the Court said in part:

> "It is urged that the plaintiff was not relieved by any order from the superintendent or train dispatcher. But a man does not have to receive an order to quit work when his hours of daily service have expired. The plaintiff knew this. He did not inquire of the conductor, his superior in the operation of the train, whether any further or other service was required of him. He treated the statute and the notice of the superintendent "as a command, and in obedience thereto he left the engine, where his duty, if at work, required him to remain, and went to the caboose and made up his bed and lay down upon it and went to sleep. In our opinion, he was not on duty at the time the collision occurred, and the defendant's motion for a directed verdict should have been granted." 71 A. L. R., pp. 858-859.
>
> *"The class of railroad employees known as train crews frequently lodge, sleep and eat in their way cars in railroad yards during hours off duty after the termination of their outgoing 'runs' and before the commencement of their return trips, their status while thus off duty with reference to interstate employment is not altered by the fact that they procure their rest and sleep on the master's premises and in his equipment.*

For example, it has been held that train crews while asleep in their way cars in railroad yards between trips are not employed in interstate commerce'' (Vol. 2, 2nd Ed., Roberts' Federal Liabilities of Carriers, Sec. 739, p. 1401). (Emphasis ours.)

The case of *Bourne* vs. *Southern Railroad Company,* 225 N. C. 43; 33 S. E. 2nd 239 involved a claim under the Federal Employers' Liability Act for a death which occurred on one of the routes of the Southern Railroad Company while the employee was familiarizing himself with such route. The deceased had worked for the Southern Railroad many years before his death but had never operated a train on the line where he was killed. The Supreme Court of North Carolina in affirming the decision of the Trial Court in denying liability said in part:

''The exception to the judgment as of nonsuit, entered by the Court below, cannot be sustained unless each of the following questions can be answered in the affirmative: 1. Was plaintiff's intestate, at the time of his death, an employee of the defendant? 2. If so, was he acting within the scope of his employment? 3. Was the defendant engaged in transporting goods in interstate commerce at the time of the death of plaintiff's intestate?

''The plaintiff is not entitled to recover, under the Federal Employers' Liability Act, unless her intestate at the time of his death was an employee of the defendant, acting within the scope of his employment and the defendant at the time was engaged in interstate commerce. (Citing numerous cases.)

''In considering the first question, it will be noted the Federal Act does not define the word 'employer' or the word 'employe', hence they are to be considered as having been used in the Act in their natural and ordinary sense. (Citing numerous cases.) The Act, 'being remedial, is to be liberally construed to advance the remedy proposed, but it applies only when the re-

lation of master and servant exists.' (Citing numerous cases.)

"The fact that plaintiff's intestate was an engineer employed by the Southern Railway Company to operate an engine over the Asheville-Murphy Branch, between Asheville and Bryson City, and had been so employed for a long time prior to April 7, 1941, does not necessarily establish the relation of master and servant between him and the defendant at the time of his death. The evidence on this record establishes the fact that plaintiff's intestate was riding the engine on train No. 17, on April 7, 1941, pursuant to a permit issued by the company, in order that he might qualify for a position as engineer on that part of the Asheville-Murphy Branch, between Bryson City and Murphy. He was in no sense a student engineer. He was an experienced engineer and had been employed by the Southern Railway Company for approximately eighteen years. He needed no instructions in the operation of an engine. He was present for one purpose and one purpose only—'to learn the road.' For it is admitted that he 'was riding said engine for the purpose of acquainting himself with the road, the curves, sidings and any changes that had been recently made in connection with the roadbed.' If he had been qualified and authorized to operate the engine, under the rules of the company, it would have been unnecessary for him to obtain a permit and make this trip, in order to become eligible for assignment as an engineer on that part of defendant's road.

* * * * * * *

"We do not think, under the facts presented on this record, plaintiff's intestate was an employee of the defendant on April 7, 1941, within the meaning of the Federal Employers' Liability Act, *but at most was a licensee under and by virtue of his permit. He had no duties to perform for or on behalf of the company in connection with the operation of the train, and the engineer was without authority to engage his services for any purpose, except in case of an emergency.* (Cit-

ing case.) The rules of the company with which plaintiff's intestate was familiar, provided that the regular engineer, while on duty, must not leave his engine except in case of necessity, and then only in care of the fireman. The evidence shows no necessity or emergency requiring the absence of the regular engineer. Furthermore, there is no evidence to the effect that plaintiff's intestate was "was to receive any compensation or other return for making the trip, save and except the information he would obtain for his own benefit.

"Moreover, conceding but not deciding, that plaintiff's intestate was an employee, we *think* the second question presented should also be answered in the negative. For, as stated in 34 Am. Jur., Sec. 437, p. 852: 'It may be conceded that one has no claim of the breach of a duty charged upon the employer by the Employers' Liability Act where it appears that the employee was in fact injured while acting outside the scope of his employment, as where he is injured while voluntarily assuming to do something that the employer did not employ him to do.' (Citing numerous cases.) In the instant case it will be noted that plaintiff does not even contend that her intestate was employed to do what he did do. We think his very presence on the engine under a permit, obtained for the purpose of observing the road, is evidence of the fact that he was not authorized by the defendant to act as engineer on that trip. He knew he was without authority under the express rules of the company to assume the duties of the engineer at the time and place he did assume them. Hence, the defendant is not answerable in damages for his death under the provisions of the Federal Employers' Liability Act" (33 S. E. 2nd, pp. 241-242). (Emphasis ours.)

II

Angelo Jackson was not a fellow servant of Respondent at the time Respondent was injured.

Angelo Jackson discontinued his work with the Petitioners at the same time Respondent's work was discontinued, namely, Thursday January 3, 1946, at around six o'clock P. M. Hence, he was using the railroad car at the time Respondent was injured on the same basis and under the same circumstances that Respondent was using it. The use of this car by them was simply permissive on the part of Petitioners. Since Respondent was not engaged in work for the Petitioners at the time of his injuries, it necessarily follows that Angelo Jackson was not a fellow servant of Respondent at that time.

> ". . . To permit the application of the fellow-servant doctrine, the injured servant must at the time of the injury not only be serving the same master, but be engaged in the same employment with the negligent servant who caused the injury." Wood, Mast. & Serv., Sec. 435.

In the case of *Reeve* v. *Northern Pacific Railway Company,* Washington Supreme Court, 144 Pac. 63 L. R. A. 1915 C, p. 37, plaintiff, an employee of the railroad company, was injured while wrestling with another employee of the railroad company in one of the railroad company's cars. The car was engaged in interstate commerce. Suit was brought under the Federal Employers' Liability Act to recover damages for the injuries. The Court in holding that the employee who injured plaintiff was not a fellow servant said in part:

> ". . . To render the carrier liable the negligent act must occur while the employees are doing some act required in the prosecution of the carrier's business.

" 'For the employer to be held liable, in damages, for an injury to an employee, the injury must not only arise out of, but it must also occur "in the course of," the employment. If the employee, instead of attending to the business of the employer, at the time of the injury, was engaged upon some business of his own, or if the work done by him was outside the scope of his employment, and as a result of the performance of such outside duties he was injured, then the employer is not responsible, for in the performance of such duties the relation of employer and employee did not exist, since he was not employed to perform any such service. And not only is an employee himself precluded from recovering for an injury, where he had voluntarily abandoned his service of his employer and engaged himself upon some independent business, but his employer is not responsible for any injury that he may occasion other employees while so engaged upon such outside business, for, to render the employer liable for injuries caused by his employees, the act that caused the injury must have been done in the scope of the employees' duties for the employer.' White, Personal injuries on Railroads, Sec. 227.

"It remains to inquire whether the injury here suffered by the appellant was the result of a negligent act of a fellow employee committed while he was in the prosecution of the employer's business. Clearly it was not, and is not so claimed by the appellant. The liability is rested on the broad wording of the statute, which, as we say, was not intended to cover negligent acts of an employee in no way connected with the business the prosecution of which he was employed to aid." L. R. A. 1915 C, p. 37 (38).

III

The Court of Appeals erred in failing to hold that trying the Tennessee Workmen's Compensation case and the Federal Employers' Liability case together was error.

It is believed that the Federal Employers' Liability Act contemplates the trial of cases arising under the provisions of said act separately from the trial of cases based on statutory provisions of the various States. Particularly is this so in a case based upon a state statutory provision that is tried before a court without a jury, as was the *Workmen's Compensation* case that was tried at the same time the instant case was tried. It is most difficult to try two cases at the same time, especially where one of them is to be decided by the Court, and is not based upon negligence, and the other is to be decided by the Jury under the instructions of the Court, and is based upon negligence. It is submitted that the trial of the two cases together, one of them appealable directly to the Court of Appeals of Tennessee, and the other directly to the Supreme Court of Tennessee, is contrary to the letter and spirit of the Federal Employers' Liability Act.

IV

Cases Cited by Court of Appeals of Tennessee Distinguished

The Court of Appeals cited and stressed the case of *Virginian Railway Company* v. *Early* (Circuit Court of Appeals, 4th Circuit) 130 F. (2d) page 548, in support of its holding that Respondent was injured while engaged in matters incident to his employment at the time of his injuries. In that case the railroad machinist, after arriving at machine shop about twenty minutes before starting to work, proceeded to lunch room maintained by the railroad for convenience of its employees to obtain a cup of coffee

and while returning to work he reached a point 200 feet from the machine shop where he was to enter upon his work, when he was injured by escaping steam from a railroad engine on nearby track. The Court held that the machinist was injured while acting in his capacity as an employee of the railroad and within the scope of his employment. In the course of the opinion, the Court said:

> ". . . it can be truly said that he was on his way to work when the accident occurred . . ." (Page 551).

That case is distinguishable from the case at bar upon the grounds: That the machinist was on his way to work and was preparing to go to work at the time of the injury. If he had not been injured he would have been on the job within five or ten minutes after said injury. In the instant case, Respondent was not on his way to work or engaged in preparation for work.

The case of *Chicago M. St. P. & P. R. Co.* v. *Kane,* 33 Federal 2nd, 866 was also cited by the Court of Appeals. In that case, the employee, while passing from his bunk on a sidetrack to an outhouse maintained by the railroad for its employees, was killed by steam from an engine upon the tracks where he worked. The employee and other members of his crew were informed at breakfast hour, about 6:45, that they were to go to work at 8:00 o'clock. The accident happened before the work hour arrived. The Court, in holding that the injury was covered by the Federal Employers' Liability Act said in part:

> "By the conditions of his employment, he was necessarily on appellant's premises, *and was making necessary preparations for the work* in which he was to engage an hour and a half later, *in a reasonable manner and within a reasonable time.*" 33 Fed. Rep. 2nd, p. 868. (Emphasis ours.)

The *Kane* case may be distinguished from the case at bar in a number of ways: (a) Kane was on the premises where

he actually performed his work and was making necessary preparations to go to work. Respondent was not on the premises where he actually performed his work at the time he was injured, but was in a box car near the post office in Johnson City, while he actually performed his work on the side tracks of the defendants near the Soldiers Home in Johnson City; (b) Kane was making necessary preparations for the work he was to engage in an hour and a half later. Respondent was not making any preparations for work, but intended to go home the day following his injuries. He had been off from work approximately twenty-eight and one-half hours and did not intend to return to work until the following Monday, January 7. The circumstances under which Respondent was injured were no more incidental to his work than his going to the picture show in Johnson City. Had he not passed up the opportunity to go to his home on Friday, January 3, along with a number of other members of his crew, including his boss, he would not have gone to the picture show in Johnson City. It is respectfully submitted that the holding in the *Kane* case is in no way controlling of the case at bar.

The case of *Erwin* v. *Pennsylvania Railroad Company* (District Court, E. D., N. Y.), 36 Federal Supplement 936, was also cited. In that case a brakeman was employed as a member of shifting crew in moving from one place in the state to another place in the same state dead engines which were then to await repair, but which were theretofor and thereafter used and to be used in interstate commerce. The brakeman was injured while engaged in such work. The Court held that his injuries were covered by the Federal Employers' Liability Act.

The *Erwin* case may be distinguished from the case at bar upon the ground that Erwin was at work at the time of his injuries and as stated by the Court:

> "The question to be answered is whether or not the Plaintiff at the time of his accident, was employed in

> interstate commerce within the purview of the Federal Employers' Liability Act as amended by the Act of Congress, approved August 11th, 1939 . . ." (Page 939).

In the instant case Respondent was not at work. Respondent was not engaged in Petitioners' business at the time of his injuries.

Erie R. R. Co. v. *Winfield* (1917), 224 U. S. 170, 61 L. Ed. 1057, is likewise cited. In that case an employee of an interstate carrier in charge of a switching engine was killed while leaving the yards of the carrier after his day's work, which had included employment in intrastate and interstate commerce. The Court held that the employee was engaged in interstate commerce at the time of the accident within the meaning of the Act. In the course of the opinion the Court said:

> "In leaving the carrier's yard at the close of a day's work the deceased was but discharging a duty of his employment . . ." (U. S., p. 172, L. Ed. 1065).

It is clear that this case is not controlling of the case at bar.

The case of *North Carolina R. R. Co.* v. *Zachary* (1913), 232 U. S., p. 248, 58 L. Ed., p. 591, is cited. In that case a railroad fireman after inspecting, oiling and firing his engine for the intrastate haul of a train containing some cars that had come from another state, was killed by a switching engine while he was attempting to cross the tracks intervening between the engine and his boarding house. The Court held that he was covered by the Federal Act. The Court said:

> "Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just pre-

pared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

Thus it is shown that the deceased in the *Zachary* case was engaged in work for his employer at the time he was killed. The principle announced by the Court in that case is not in conflict with the contentions being made by the Petitioners in the case at bar.

The case of *Brock* v. *Chicago R. I. & P. Ry. Co.* (Supreme Court of Missouri, 1924), 226 S. W., p. 691, 305 Mo. 502, is cited. In that case the employee was injured during the noon hour. "He had just returned from his work to the bunk car occupied by him and five other men for the purpose of eating his noon day meal in the car adjacent, provided by the defendant for that purpose. Finding that the water in his car had been used up by the others, plaintiff took a bucket and started to bring water from a well which was north of the tracks of defendant and in a northwest direction from his bunk car" (p. 692). He was struck by a passing train while going to get the water. The Court held:

> "The getting the meal at the place and under the circumstances cannot be held to be a severance of the relation (referring to master-servant relation), but a required and regular incident to it" (p. 697).

The holding in the *Brock* case is in accord with the general rule that an employee, while at the place where he actually performs his work, who temporarily steps aside from his work to do something necessary to life, namely, to get food or water, or to respond to the call of nature, does not act beyond the scope of his employment in so doing; that

such acts are incidental to the employment and within the contemplation of both the employer and employee.

V

Authorities cited by Court of Appeals of Tennessee in support of its holding that the issues were for the jury are distinguishable from the instant case.

A portion of the language used by the Court of Appeals in concluding that the relationship of employer and employee existed between the parties at the time of Respondent's injuries within the purview of the Federal Employers' Liability Act is as follows:

> "The debatable qualities of these issues, the fact that fair-minded men might reach different conclusions emphasizes that these present questions which should be properly left to the jury . . . (citing cases) (R. 146, 147.)

The quoted language appears to be practically the same as the language used by this Honorable Court speaking through Mr. Justice Douglas in the case of *Bailey* v. *Central Vermont Railroad Company,* 319 U. S. 350, 352, 87 Law Ed. 1444, 1447, when he said:

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasizes the appropriateness of leaving the question to the Jury."

It is not believed that the quoted language used by the Court of Appeals is applicable to the case under consideration. In the *Bailey* case, the employee was injured while actually at work and the question of negligence was the principal question involved. The Court held that the facts presented were sufficient to present to the jury the question of negligence or lack of negligence upon the part of the railroad company.

The determinative questions in the instant case are whether or not the employer-employee relationship existed within the meaning of the Federal Employers' Liability Act at the time of the inquiries, and if so, whether or not Respondent was engaged in matters incidental to his employment in interstate commerce.

Milburn v. *Chicago M., St. P. & P. R. Co.*, 56 S. W. (2nd), 80 (Supreme Court of Missouri in 1932) is also cited. The Court of Appeals of Tennessee in the instant case appears to have patterned its findings of fact after the findings of fact in the *Milburn* case, but it is not believed that the facts in the two cases are the same.

In the *Milburn* case, Plaintiff was burned by the explosion of gasoline kept in a barrel while using the gasoline in a stove. The Court found that Plaintiff was required to stay in the camp car where he was injured over the week ends and expected to wash his clothes in such camp. The suit was based upon two counts, one upon the Federal Employers' Liability Act and the other upon the common law of the State of Iowa as changed by the Iowa Workmen's Compensation Law. The Court concluded that the case should not have been submitted to the Jury upon the theory that the railroad company was liable under the Federal Employers' Liability Act. The Court also concluded that there was evidence from which the Jury could find that the relation of master and servant existed between the railroad and Plaintiff at the time of Plaintiff's injury.

The case is distinguishable from the instant case because: (1) The Court held that the case should have been submitted to the Jury on the common law of Iowa as amended by the Workmen's Compensation Act of Iowa. The terms of the Workmen's Compensation Act are not quoted in the opinion. The instant case does not involve the Workmen's Compensation Act of any state, but is based solely upon the federal act. (2) Under the facts in the

Milburn case the Court found (a) that Milburn was required to stay in the camp car over week ends unless he was on vacation. (b) The Court further found that Milburn was required to wash his clothes in the camp cars. Neither of these requirements exist in the present case. On the other hand, the Petitioners in the instant case not only did not require Respondent to stay in the railroad car after he was released on Thursday, but did not expect him to stay in said car (R. 51).

The case of *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 87 L. Ed. 610 (1943), is cited. The principal question in that case was whether or not the railroad company could rely upon the assumption of risk of the employee in undertaking to establish absence of negligence on its part. The Court held that the effect of the 1939 amendment of the Federal Act is to "obliterate from the law every vestige of the doctrine of the assumption of risk."

The principle announced in this case is in no way applicable to the issues involved in the case at bar.

Jester v. *Southern Ry. Co.* (1944 Supreme Court of South Carolina), 29 S. E. (2nd), p. 768, is cited. The Court held that it was "A reasonable inference from the testimony that the fireman was at least preparing to use the coal scoop in the discharge of his duties at the time he was shot, and that being an issue, it was properly submitted to the jury." The proof showed that the engineer shot the fireman sometime subsequent to an argument between them over a matter pertaining to their duties on the railroad engine and at a time while they were both on duty for their employer.

It is obvious that the principles involved in this case are not controlling of any issues involved in the case at bar.

35 Am. Jur., Sec. 442, p. 857 is also cited. This reference is authority for the Petitioners. The following language may be found:

> "According to the rule advanced by many cases, 'interstate commerce,' as used in the Act, is used not in a technical, legal sense, but in a practical sense suited to the occasion; and the test which is now the accepted test of the applicability of the statute is whether the employee was, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it. This test has been varied so as to require that the injured employee shall have been engaged in work which was a part of the interstate commerce of the railroad company, at the time of injury, to be within the provisions of the Act.
>
> • • • • • • •
>
> "In many situations, the question whether an employee at the time of sustaining an injury was engaged in interstate commerce has been submitted to the jury for determination. Where, however, there is no controversy as to the circumstances attending the employee's injury, the question as to the nature of his employment is held to be one of law" (pp. 858-9).

L. & N. R. Co. v. *Potts*, 178 Tenn., p. 425, is also cited. In that case a fireman while engaged in switching operations involving cars used in both intrastate and interstate commerce received injuries from which he died. The suit was brought to recover under the Workmen's Compensation Act. The Court held that the deceased was subject to the Federal Act because he was engaged in interstate commerce at the time of his injuries.

The ruling in this case is consistent with the contentions of the Petitioners in the case at bar.

The case of *Great Northern Ry. Co.* v. *Industrial Com.*, 245 Wisc. 375, 14 N. W. 2nd, p. 152 was cited and quoted from extensively.

In this case "Christ Hammer was fatally injured on December 24, 1941, while engaged in work connected with the general repairs of the ore docks. He had worked on the ore docks from May, 1941, to the time of the accident. From May until November 7, 1941, he was a member of a crew engaged in painting and making such repairs as were necessary to be made during the time the docks were in operation . . . When injured Hammer was acting as signal man on a locomotive crane . . ."

The Court said that the appeal presented two questions, one of which was stated by the Court as follows: "(1) Where ore docks are used exclusively for handling iron ore in interstate commerce, is an employee engaged in interstate commerce while making repairs to the ore docks during wintertime when the docks are not in operation?" (page 154).

The second proposition involved a *res adjudicata* question which need not be considered at this time. The Court held that Hammer was engaged in interstate commerce within the meaning of the Federal Act at the time of his injuries. It will be noted that Hammer was working at the time of his injuries. The question of his employment was not involved.

The principle announced by the Court in the *Great Northern Ry.* case does not run counter to the contentions of the Petitioners in the case at bar.

VI

Cases Cited by Supreme Court of Tennessee Distinguished

All of the cases cited by the Supreme Court of Tennessee involve the construction of the 1939 amendment to the Federal Employers' Liability Act except one. In each case the employee was actually at work at the time of the injury. The Court held in each case that the general duties of the

employee furthered or substantially affected interstate commerce and his injury was therefore covered by the Federal Employers' Liability Act.

In those cases the question of whether or not the injured party was an employee of the railroad company was not involved, while in the instant case this question is one of the determinative questions.

The Supreme Court of Tennessee also cited the case of *Orman* v. *Salvo* (Circuit Court of Appeals, 8th Circuit, 1902, 117, Fed. 233). That case, although the opinion does not so state, was apparently an action based upon the common law. The Plaintiff was injured by a blast, while sleeping in a tent near Defendant's operation, and in which he slept while off duty. The Defendant had established the custom of warning the employees who slept in tents of the blasts before they were set off, in order to give them an opportunity to get to a place of safety. On the occasion in question, the warning was not given and Plaintiff was injured as a result of the blast. The Court held that the question whether the warning of the blast was given Plaintiff should be left to the jury, with instruction that if he had such warning and failed to go to a place of safety, he was not entitled to recover. The evidence on the question of the warning was conflicting. The jury found in favor of Plaintiff and the Court approved such finding. In the course of the opinion the Court said:

> "Plaintiff occupied the tent, not as a boarder or tenant, but as a servant of the Defendants, and his board and lodging was received in part compensation for his services. (Wood, Mast. & Serv., 144) But while engaged at his meals or wrapped in slumber he was performing no services for the master, and being in the performance of no employment, but obtaining and enjoying compensation from the master, he was not during such time the fellow servant of any of the employes who were at work, about which he was in no

way engaged or assisting. He was not in the condition of a servant who is being conveyed in a car to his work, but was as much separated from it as if he had been sleeping in his own home a mile away. The master, who had furnished him this lodging, located at a place made dangerous by the discharging of blasts in conducting the master's business, owed him the duty of giving him timely warning, to enable him to avoid the danger . . ."

The principles announced in the above case are not controlling of the case at bar.

VII

United States Supreme Court not limited to consideration of the evidence as stated or referred to by the State Courts in their opinions.

This Court, on Certiorari, is not confined to a consideration of the evidence stated or referred to by the State Courts in their opinions, but will review the entire record and determine for itself whether the evidence sufficed to establish the employer-employee relationship between Petitioners and Respondent at the time of Respondent's injuries; whether the evidence sufficed to establish the conclusion that Respondent was engaged in matters incidental to employment by Petitioners in interstate commerce. This Court will likewise examine all of the evidence to determine if Petitioners were denied a Federal right or immunity by the opinions and judgments of the State Courts.

Gr. Northern Ry. Co. v. *State of Washington,* 300 U. S. 154, 81 L. Ed. 573;

United Gas Public Serv. Co. v. *State of Texas,* 303 U. S. 125, 143, 82 L. Ed. 702;

Chicago Gr. Western R. Co. v. *Rambo,* 298 U. S. 99.

VIII

Writ of certiorari should be directed to Court of Appeals of Tennessee, Eastern Section, sitting at Knoxville, Tennessee.

The decision and judgment of the Court of Appeals were rendered and entered on July 9, 1947 (R. 82-93).

The decision and judgment of the Supreme Court of Tennessee, wherein said Court denied the Writ of Certiorari and thereby refused to take jurisdiction of the cause were rendered and entered October 3 and October 6, 1947, respectively. The decision and judgment of the Court of Appeals of Tennessee became final either on October 3, 1947 or October 6, 1947, the latter date being the date on which the final order was entered putting the opinion into effect. The Court of Appeals of Tennessee was therefore the highest court of the State in which a decision could be had in said cause.

Amer. Ry. Express Company v. *Levee,* 263 U. S. 19; 68 Law Ed. 140.

Conclusion

It is believed that the Tennessee State Courts extended the coverage in this cause far beyond the meaning of the Federal Employers' Liability Act and the purposes of the Congress in the passage of said Act. It is respectfully submitted that the evidence in the Record clearly shows that Respondent was not employed by Petitioners in interstate commerce at the time of his injuries within the meaning of the Federal Employers' Liability Act; that Respondent was not engaged in matters incident to employment by Petitioners within the meaning of said Act, and that the holdings of the Tennessee Courts in these particulars are clearly erroneous. The proof in the Record shows that Respondent was not engaged in the business of Petitioners at the time

of his injuries, but was engaged in personal matters unconnected with Petitioners' business.

Petitioners believe that the State Courts in this cause have decided Federal questions of substance not theretofore determined by this Honorable Court and that such questions were decided erroneously. Petitioners verily believe that they have been deprived of a Federal right or an immunity in contravention of the Federal Employers' Liability Act.

Petitioners further believe that this Court should decide these questions to the end that such decision may be a guide for the lower courts in the future and that a great injustice be corrected.

Petitioners respectfully submit that they have been deprived of a Federal right as a result of findings by the Tennessee State courts shown in the record filed herewith and hereinbefore pointed out, which findings are without evidence to support them.

Petitioners, therefore pray that this Court issue its Writ of Certiorari herein and that the final judgment and opinion of the Court of Appeals of Tennessee rendered herein be reversed.

Respectfully submitted,

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Supreme Court of The United States

October Term, 1947

No. 487

ATLANTIC COAST LINE RAILROAD COMPANY, and LOUISVILLE AND NASHVILLE RAILROAD COMPANY, doing business as CLINCHFIELD RAILROAD COMPANY,

Petitioners,

vs.

DOCK L. MEEKS, by next friend, ADA FONEY,

Respondent.

REPLY BRIEF OF RESPONDENT TO PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

I.

Certiorari Should Be Denied As The Record Filed By The Petitioners Is Not The Complete Record Of The Trial In The Appellate Courts Of Tennessee.

As appears from the Record in this cause (R. 121-122) the Petitioners served upon Respondent a Praecipe, designating that only Assignments of Error of Petitioners be sent up, and directing the said Clerk of the Court of Appeals of Tennessee not to send up the Briefs or Statement of Fact made

by the Petitioners in the Court of Appeals of Tennessee; and also directing said Clerk not to send up the Reply Briefs of Respondents, filed in said Court.

From this designation it also appears that not all of the petition for Certiorari which the Petitioners filed, seeking to remove the case from the Court of Appeals to the Supreme Court of Tennessee, was included in the record brought to this Court, but only a portion therefrom called, "Assignments of Error."

It further appears that neither of the Briefs filed by the Respondent in either of said lower Appellate Courts was included in the Record brought to this Court by the Petitioners. (R. 121-122, Sections 6 & 7 of Praecipe.)

We submit that it appears to us from an examination of Rule 38 of this Court, that on Petition for Certiorari there is no provision for diminution of the Record by designation, but that the Rule requires the Petitioners' Petition for Certiorari:

> "* * * shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. * * *"
>
> Rule 38, Supreme Court of United States, Sec. 1.

Rules 11, 12, and 13, of the Court of Appeals of Tennessee, and Rules 14, 15, and 16, of the Supreme Court of Tennessee are substantially the same, and almost word for word.

> Rules of Court of Appeals of Tennessee, 11, 12, and 13, Williams' Code, Vol. 7, p. 546, 549, and 550.
>
> Rules of Supreme Court of Tennessee, 14, 15, and 16, 173 Tenn. 873-878.

The substance of these rules is that in the Court of Appeals the Plaintiff in Error must file Assignments of Error and a supporting Brief, according to those rules; and unless the Assignments of Error is supported by a Brief it will be presumed to be waived, and the Assignments of Error must be preceded by a statement of the case. The Defendant in Error is also required to file a Brief.

Rules 11, 12, and 13, of the Supreme Court of Tennessee regulate the filing of petitions for Certiorari to remove the cause from the Court of Appeals to that Court. (173 Tenn. 872-873.)

The substance of these rules is that the petition for Certiorari shall contain a statement of the case showing prima facie, the error or errors of the Court of Appeals, and it shall be accompanied by an Assignments of Error, in accord with Rules 14 and 15 (above), and a Brief in support thereof, and shall be verified by affidavit (Code of Tenn. 1932, Sec. 10629). The Respondent must then file a Reply Brief in support of the action of the lower court.

Construing these Rules the Courts of Tennessee have held that a Brief may aid an insufficient Assignment of Error, and point out the error made.

Commerce Union Bank v. *Gillispie*, 182 Tenn. 6, 184 S. W. (2d) 37.

It has also been held that the Assignments of Error and the Briefs of the parties in the Court are in the nature of the pleadings of the parties, framed under the rules of the Court.

Wilson v. *Moudy*, 22 Tenn. App. 356, 375, 123 S. W. (2d) 828.
Woods v. *Frazier*, 86 Tenn. 500, 8 S. W. 148.
Cheatham v. *Pearce*, 89 Tenn. 668, 15 S. W. 1080.

Therefore, as the Statement of Fact, Assignments of Error, and Briefs of the parties are the pleadings in the Tennessee Appellate Courts, the Petitioners were required by Rule 38 of this Court to present the same as a part of the Record of the proceedings in the Court to which it is asked the petition for Certiorari be directed.

Thus Rule 38 required Respondent to present the entire Record to the Supreme Court of the United States on petition for Certiorari. If the Petitioner conceives that it is not desirable to print the entire Record, then the Petitioner may treat with the Respondent to see if portions of the Record may be left out in the printing. This is a reasonable requirement, as on a petition for Certiorari this Court must have the entire Record where it is instantly available for reference. If the entire Record is brought and not printed it is still available if reference is desirable. On petition for Certiorari the Respondent has no method of adding to or taking from the Record that will be presented to the Supreme Court of the United States. In an appeal the rules provide that the Appellee may serve a designation as well as the Appellant, and all matters so designated by either party shall be made a part of the Record on appeal, and if by oversight, additional portions of the Record are needed, the Appellate Court may allow addition or order the rest of the Record sent up.

Therefore, it is submitted that Petitioners have not complied with Rule 38, Sec. 1; and that for this reason the petition for Certiorari should be denied.

The petition for Certiorari is further insufficient. The Petitioners fail to present in this Court the full Statement of Fact, Assignments of Error, petition for Certiorari, and Briefs of the parties in the Appellate Courts of Tennessee.

This makes it impossible for Petitioners to comply with Rule 38, Sec. 2, and Rule 12, Sec. 1, of the Supreme Court of the United States. The Record, as presented, can only show the action of the Tennessee courts, but cannot show how Petitioners presented the question to those courts, when they were presented, nor the position Petitioners took or urged in the lower court.

II.

Statement of Fact

It is desirable, of course, to eliminate all uncontroverted matters. We feel there are two matters which may be eliminated as being uncontradicted. These are (1), that the parties were engaged in interstate commerce, and (2), that the Respondent was injured by the Petitioners' negligence.

It was stipulated that interstate trains move over the tracks of Petitioners, (R. 32, and R. 84), and the uncontradicted proof is that Respondent was working on these tracks as a section hand on the extra gang, on the division from Erwin, Tennessee, to Dante, Virginia, over which both interstate and intrastate trains run.

(Dock L. Meeks, Q. 15-18, R. 42, and of 24-31, R. 43).

Pederson v. *Lackawanna & Western R. Co.* 229 U. S. 146, 33 S. Ct. 650, 57 L. Ed. 1125, Ann. Cas. 1914 C. 153. A section hand who works on tracks traveled by interstate trains is engaged in interstate commerce.

As to negligence averred and proved, the Respondent testified without contradiction that:

1. No lamp had ever been in his car since he had been employed and they had used this "tunnel torch" or "flambeau", which was furnished by Petitioners for their use, all the time.

(Dock L. Meeks, R. 61-63, XQ, 90-107, R. 51-52).

2. That Angelo Jackson lighted it on the night of the injury and then sought to fill the torch with the substance furnished by Petitioners, and it exploded; and Jackson, seeking to save himself, pitched the torch onto the floor, where it burst upon and burned the Respondent.

(Dock L. Meeks, R. 45-47, Q. 55-73).

3. Respondent smelled gasoline and knows the smell of gasoline, and there was gasoline in the can instead of kerosene.

(Dock L. Meeks, R. 47, Q. 77-83. R. 63, XQ. 110-113).

4. "Tunnell torches", or "flambeaus", are to be used only for outside work for safe usage, according to this proof.

(Dock L. Meeks, R. 62-63, XQ. 104-107).

5. The railroad furnished both the torch and the fluid to be used in it, and this was Respondent's only source of light for four months.

(Dock L. Meeks, R. 64-65, RQ. 1-18).

6. Angelo Jackson was 15 at the time, and was employed by Petitioners.

(Dock L. Meeks, R. 65, RQ. 19-20).

7. It was not a safe place.

Bailey v. *Cent. Vt. Ry. Co.*, 319 U. S. 54, 63 S. Ct. 1062, 64, 87 L Ed. 144).

8. Petitioners did not deny this proof, and the inference to be drawn in a civil case where the Petitioners refuse to testify or introduce witnesses, is that their testimony would be favorable to the Respondent.

Kirby v. *Talmadge*, 160 U. S. 379, 16 S. Ct. 349. *Standard Oil Co.* v. *State*, 117 Tenn. 618, 672, 100 S. W. 705.

9. The car, torch, fluid, Respondent, and other employees were under control of Petitioners.

Therefore, we have eliminated, and shown that two matters certainly exist.

1. Petitioners were engaged in interstate commerce, and employed Respondent in duties directly, closely, and substantially furthering interstate commerce, and his duties were wholly such; and,

2. Respondent was injured by negligence of the Petitioners.

Only one other element is necessary to bring the action within the coverage of the Federal Employers' Liability Act, and that is that we show that Respondent was an employee of Petitioners at the time he was injured. Perhaps this is the primary point, but as it is the only fact really argued by Petitioners, we have left it to this portion of the Brief.

The facts of the case, as stated by the Petitioners, have been made in the light of the Petitioners' interpretation of the Respondent's testimony, and the testimony of the respondent's witnesses. Therefore, we feel a statement of

fact should be made by us and, as we have already stated the facts of negligence, this statement will deal largely with the relationship between the Respondent and Petitioners, with reference to his contract of employment with the Petitioners, his duties for the Petitioners, and the benefits to be conferred on the Respondent by that contract, and the general conduct of the parties during Respondent's employment.

1. Respondent was a colored boy 17 years of age at the time of the injury, and is now 18 years of age. Angelo Jackson was 15 years of age, and is now 16.

(Dock L. Meeks, R. 42, Q. 7-9; R. 65, RQ 19-20).

2. Respondent's home is at Union Mills, North Carolina, 120 miles from Johnson City, Tennessee.

(Ada Foney, Q. 5-8, R. 41).

3. Respondent had worked at this occupation since September or October, 1945, a period of about 3 or 4 months.

(Dock L. Meeks, R. 56, XQ. 15).

4. Respondent worked as a section hand from Erwin, Tennessee to Dante, Virginia, on this division of the road.

(Answer of Petitioners, R. 7-8, Sec. VI of answer; Dock L. Meeks, R. 42, Q. 15-18; R. 43, Q. 26-27).

5. The Petitioners furnished "Shanty cars", or "bunk cars" for the employees of the extra gang to sleep in. These cars were transported from place to place on the division as occasion demanded. The cars had bunks. There were white and colored cars, and each employee was assigned a bunk.

A cook car was furnished, and the employees were charged 30c per meal at the cook car, and this was taken from their pay. The employees furnished their own linen.

(Dock L. Meeks, XQ 79-85; R. 51, Q. 138-144; Answer of Petitioners in Workmen's Compensation suit, R. 7, Sec. V).

6. In the week immediately preceding this injury, the gang of which the respondent was a member, worked on the first day of the year of 1946, and were able to get in 40 hours by Thursday night at 6 o'clock P. M.

(Dock L. Meeks, R. 63-64, XQ. 115-124).

7. Respondent was on call at all times, in the event of a wreck or any unusual demand upon the repair forces of the railroad. The extra gang worked anywhere on the division, and were shifted around by freight engines.

(Dock L. Meeks, R. 43-44, Q. 24-44; R. 53, Q. 170-175; R. 76-77, Q. 116-130).

"170. Q. Now Dock, at all times you were employed by the railroad, were you subject to call at all times?

A. Yes.

Mr. Taylor: We object to that because it is leading, if Your Honor please.

The Court: He said he was.

The Witness: Yes, I was subject to call.

171. Q. (By Mr. Bralley) You say your duties were this extra gang:

A. Yes.

172. Q. Extra force?

A. Yes, if anything was to be done on the railroad.

173. Q. What was your understanding of this employment, if they had a wreck what would occur, if anything?

A. We would be in bed at night, don't care when it is in the night, if you have a wreck up there, they would come around, wake us up to go to work.

174. Q. What did you do?

A. Get up and fix it.

175. Q. Fix the track?

A. Yes, sir."

8. The Petitioners offered to those who desired, transportation home over the weekends, but the respondent, or any member of the extra gang, was expected, under the contract of employment, to stay in the cars over the weekend, and several other employees of the extra gang who had similar rights and were similarly employed, stayed there over the weekend.

(Dock L. Meeks, R. 51, Q. 132-137; R. 65-66; RQ. 22-24; R. 50-51, Q. 112-133).

9. Respondent came in and was advised by one of the workmen that he could get his check early by going to Erwin after it, and with another boy he went to Erwin. Respondent wanted his check so he could get ready and go home on Friday, but was unable to get the check until train time, when the foreman arrived and got the checks and distributed them. This was on Friday morning, and when Dober, the foreman, gave him his check he could not get ready to go home before time for the train to leave, and consequently Respondent was compelled to wait and try to go home on the following day.

(Dock L. Meeks, R. 45, Q. 50-52; R. 49, Q. 102-104; R. 56-58, XQ. 11-48).

10. After he missed the train at about 11 A. M., because he was unable to get his check in time to get ready to go home, the Respondent shopped at the Unaka Stores, the railroad store in Erwin, visited in Erwin, and came by bus to Johnson City, arriving about 5:00 P. M., attended a show, and then went to the railroad yards, to the shanty car provided for him and to which he was assigned, and entered the car about 10:00 or 10:30 P. M.

(Dock L. Meeks, R. 58-60, XQ. 49-86).

11. When the boys entered the car, there were no lights and the Petitioners had not provided lamps of any type for lighting purposes, but had provided a "flambeau" or "tunnel torch", used in outside work, and they lighted this and it did not burn well. Angelo Jackson started to refill it from the can of oil provided for that purpose. As he poured the substance from the can, the torch exploded, and he threw the torch from him. It landed on and exploded on the Respondent, burning him very severely. The liquid in the oil can was gasoline instead of kerosene.

(Dock L. Meeks, R. 45-47, Q. 55-73).

12. There was no lamp in the car, nor had there been one for the duration of the time Respondent had worked.

(Dock L. Meeks, R. 61-63, XQ. 91-113).

13. Respondent was not discharged nor fired on Thursday, January 3, 1946.

(Dock L. Meeks, R. 54, Q. 179-180).

14. Including the Respondent, there were at least five members of the gang in the car the night Respondent was injured.

(Dock L. Meeks, R. 50-51, Q. 113-138).

15. The Respondent was injured in the railroad yards of the Petitioners, and in the car furnished by the Petitioners to Respondent and others, in which they were to live and sleep while working for the Petitioners, which car was furnished and owned by the Petitioners. The Record does not show who was directly in charge of the extra gang and the men in the cars while Gus Dober, regular foreman, was away. However, it is a reasonable conclusion that this would have appeared had Petitioners put on proof. As the cars and equipment were in the yards, and the men in the cars were subject to call, it is a reasonable deduction that all were subject to the will of the employer during all times they were in the cars.

(Dock L. Meeks, R. 44, Q. 32-47; R. 52, Q. 150-155; R. 55, XQ. 3-5).

16. The whole work of the Respondent for Petitioners was in furtherance of interstate commerce.

(Stipulation, R. 32; Sec. VI, Answer of Defendants, R. 7-8).

17. The Petitioners were in Court, had announced ready for trial, and had their witnesses present. At the conclusion of the Respondent's testimony, the Petitioners rested. The Petitioners offered no proof and the Respondent is entitled to the presumption of law that, had the Petitioners offered proof, it would have shown matters against the interest of the Petitioners, and would have borne out the Respondent's contentions with reference to his claim.

(*Kirby* v. *Talmage*, 160 U. S. 379, 16 S. Ct. 349).

18. After resting the Petitioners moved the Court for a directed verdict.

(R. 69-70).

The Petitioners did not demur to the evidence.

SUMMARY OF ARGUMENT.

I.

Matters Not In Issue

We agree with counsel for Petitioners that the substantive rights of the parties are governed by the interpretation placed on the Federal Employers' Liability Act by the Federal Courts.

Bailey v. *Cent. Vt. Ry. Co.*, (April 1943) 319 U. S. 350, 87 L. Ed 144, 63 S Ct., 1062-1063.

We further agree that the words "employer" and "employee" as used in the Federal Employers' Liability Act are declared to have been used in their natural common-law sense by Congress, and are intended to describe the conventional relationship of employer and employee, or master and servant.

II.

We submit that the 1939 amendment to the Federal Employers' Liability Act materially changed it, and extended the coverage of the Act to the point that it now becomes immaterial what the employee is doing at the moment of his injury if he is an employee whose duties "* * * shall be in the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter be considered as employed by such carrier in such commerce and shall be entitled to the benefits of this chapter."

45 U. S. C. A., Sec. 51.
Ford v. *L. & N. R. Co.*, (Mo.) (Sept. 1946) 196 S. W. 2d 163-8.
Wright v. *N. Y. Cent. Ry. Co.*, 288 N. Y. 719, 43 N. E. 97 Aff. 263 App. Div. 461, 33 N. Y. S. 531.
L. & N. Ry. Co. v. *Potts*, 178 Tenn. 425, 158 S. W. (2d) 729.
Agustino v. *Penn. R. Co.*, 50 Fed. Sup. 726, 729.
Senate Judiciary Report No. 661.

III.

The mere fact that only the Respondent introduced proof does not justify the trial court in withdrawing the case from the jury. Moreover, under Tennessee practice and procedure, a motion for a directed verdict which is not granted, does not take the case from the jury.

Gulf Ref. Co. v. *Huffman*, 155 Tenn. 580, 297 S. W. 199.
Lavender v. *Kurn* (1946) 327 U. S. 645, 66 S. Ct., 740.
Osborne v. *City of Nashville*, 182 Tenn. 197, 185 S. W. (2d) 510.
Hall v. *Nash* (1947) —— Tenn. ——, 198 S. W. (2d) 649.
19 Tenn. Law Rev. 981.

IV.

The Respondent was an employee of Petitioners at the time he was injured, as the relation of master and servant is not interrupted by the end of actual working hours, but continues so long as the employee is on the employer's premises and engaged in actual or incidental duties of the contract of his employment, or while he is using a facility furn-

ished him as a part of his contract of employment on the master's premises, or while he is subject to the control of the master, or while he is exposed to a risk peculiar to the contract of employment and on the employer's premises.

36 A. L. R. 906.
Orman v. *Salvo* (C. C. A.) 117 F. 223, 235.
Moore **v. *Minneapolis & St. L. R. Co.*, 123 Minn. 191, 142 N. W. 152, 154.**
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Brown's Adm. v. *N. & W. R. Co.*, 12 Fed. (2d) 319, 321.
Chicago M. St. P. N *P. R. Co.* v. *Kane*, (9 CCA) 33 F. (2d) 866.
Northwest P R. Co. v. *Industrial Accident Commission*, —— Cal. ——, 166 P. (2d) 334.

V.

Angelo Jackson was in the same status as an employee as the Respondent, but his real status is a non-essential point, as the negligence of the Petitioners, even though coupled with his act, is the causative negligence which injured the Respondent.

Tiller v. *Atlantic Coast Lines R. Co.*, (Feb. 1943) 319 U. S. 54, 63 S. Ct. 444, 446-7.

VI.

The matter of the trial judge trying the case Respondent filed under the Compensation Act of Tennessee, while also trying the case filed under the Federal Employers' Liability Act, is a matter of State procedure and practice that has already been approved by the Court of Appeals and the Supreme Court of Tennessee, and we do not think that State procedure can be attacked in this Court.

R. 82-93, unreported opinion of Tenn. Court of Appeals.
R. 95-100, unreported opinion of Supreme Court of Tenn.
Chesapeake & Ohio R. Co. v. *De Atley*, (1916) 241 U. S. 310, 60 L. Ed. 1016, 36 S. Ct. 564.
12 A. L. R. 715.

BRIEF AND ARGUMENT

Reply To Specifications Of Error, Numbers 1 and 2

We submit to the Court, considering the words "employee" and "employer" in their natural common law sense, that the relationship of master and servant is not interrupted by

the end of actual working hours but continues so long as the employee is on the employer's premises and engaged in actual or incidental duties of his employment, and that injuries to the employee, living on the employer's premises, which are reasonably attributable to or incidental to the nature of his employment or the conditions under control of employer under which employee lives in carrying on his employment, are within the contract of employment, and further, that where the contract of employment includes the provision that the employee shall receive certain benefits from the employer, such as living in shanty cars, being carried to work, or being transported, etc., the employment is not terminated while the employee is receiving these benefits, but continues until the full agreement or contract of employment has been performed.

We feel that Petitioners do not make a correct statement of the law when they say:

> "In order, therefore, for a person to come within the purview of the Act, as amended, it is necessary for such person to be 'employed by such carrier in such commerce' at the time of his injuries, or engaged in matters incidental to his employment in interstate commerce." (Pet. Brief, 31).

Prior to the 1939 Amendment this assertion was true. However, since the Amendment of August, 1939, to Title 45 U. S. C. A, Sec. 51, the law is materially changed and the coverage extended to every employee of the interstate carrier *"any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as employed by such carrier in such com-*

merce and shall be entitled to the benefits of this chapter."

Since the 1939 Amendment it is immaterial what the employee was doing when injured, the real question being whether "any part" of employee's regular duties furthered interstate commerce.

Ford v. *L. & N. R. Co.* (Mo.) (September 1946) 196 S. W. (2d) 163, 168.

Wright v. *New York Cent. Ry. Co.* 288 N. Y. 719, 43 N. W. 97 aff. 263 App. Div. 461, 33 N. Y. S. 531.

L. & N. R. Co. v. *Potts*, 178 Tenn. 425, 158 S. W. (2d) 729.

Agustino v *Penn R. Co.*, 50 Fed. Sup. 726, at 729:

> "The weight of authority is to the effect that the Amendment should be liberally construed so as to extend the protection of this Act to all employees, any part of whose duties furthered or affects interstate commerce 'in any way.'"

The Agustino case cites some 50 cases in reaching the above conclusion. (See 50 Fed. Sup., pages 728-729).

Chief Justice Taft speaking for the Court said committee reports and explanatory statements of members of Congress in charge, made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute when its language is doubtful or obscure.

Duplex Co. v. *Deering* 254 U. S. 443, 475; 41 S. Ct. 172, 65 L. Ed. 349 (16 A. L. R. 196).

The amendments of 1939 to the Federal Employers' Liability Act (53 U. S. Stat. 1404) were embodied in Senate Bill 1708. When that bill was reported by the Committee on the Judiciary, the report was printed (Report 661). It set

forth the bill in full. It included the sections of the old statute (35 U. S. Stat. 65) which were amended and the amendments were set forth in italics. The amendment to Sec. 1 was as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance in interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this Act, be considered as being employed by such carrier in such commerce, and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act Relating to the Liability of Common Carriers by Railroads to their Employees in Certain Cases (approved April 22, 1906) as the same has been or may hereafter be amended.'"

Objectives of the Bill—

> "It is the aim of the Bill to amend the Employers' Liability Act in three particulars:
>
> "1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce." * * *
>
> "Amendment to Sec. 1.
>
> "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations. The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the

Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, in interstate transportation, or in work so closely related to it as to be practically a part of it.'

Shanks v. *Delaware, L. & W. R. R. Co.* 239 U. S. 556.

"In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

"As a result of the uncertainty which exists in borderline cases, there have been many instances in which suits were commenced and prosecuted to a final determination, only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against his claim and no recovery could be had.

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly, men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"The adoption of the proposed amendment will, to a very large extent eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in

> the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the Act."
>
> "The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed."

Thus, the test, since August 1939, is not what the employee was doing at the time of the injury, but whether or not "any part" of the employee's duties are in "furtherance * * * or directly, or closely and substantially affect such commerce." If they do, then the rights of the employee are determined and are to be governed by the Federal Employers' Liability Act.

We also call the attention of the Court to the cases cited in the opinion of the Tennessee Court of Appeals (R. 87-90), and the opinion of the Supreme Court of Tennessee (R. 95-100), wherein additional authority to the same effect is cited by these courts.

Employment Contract, When Oral, Is For The Jury

The question of whether or not the Respondent was an employee of Petitioners, since he was employed under an oral contract of employment, was to be determined by the trier of fact from what the parties said in the contract of employment and the course of dealings between Respondent and Petitioners as shown in the proof.

Gulf Ref. Co. v. *Huffman*, 155 Tenn. 580, 582, 297 S. W. 199.

This case is quoted from an opinion of the Tennessee Supreme Court. (R. 99):

> "However, the main reliance is upon another ground. The Petitioner, Gulf Refining Company, insists that the truck was owned and its driver employed and controlled, not by it, but by one Overall, whose relation to it was that of an independent contractor; that the terms of its engagement of Overall were set out in a writing introduced; that the trial court erred in failing to hold this instrument to be determinative and in failing to construe it and instruct the jury as to its conclusive effect; that the question of the relations between the Company and Overall was thus one of law which should not have been submitted to the jury."
>
> "The trial judge and the Court of Appeals found that there was such evidence introduced of circumstances, conditions and relations, outside of the writing between the parties, as called for a submission to the jury of this practically controlling question. In this we concur."

We have read the case of *Reading Ry. Co.* v. *Hancock*, and *Brady* v. *So. Ry. Co.* (Brief of Petitioners, p. 27), wherein Petitioners urge that the trial court should have decided the question of whether or not Respondent was an employee at the time of the injury. However, we do not believe that those cases hold this. The Brady case holds that it is a Federal question whether or not there is sufficient evidence to go to the triers of fact, and this is controlled by Federal interpretation. *Reading Ry. Co.* v. *Hancock*, holds that where facts are stipulated the deductions and conclusions are for the Court. But that was a case decided under Federal Procedure.

In the case at bar the jury is the trier of fact. Petitioners moved the trial court to direct a verdict in their favor. (R.

69-70). Petitioners would be entitled to have this motion granted only if there was a complete absence of probative testimony in favor of Respondent's contentions. If the trial court did not err in overruling that motion, then there is no error, for such a motion does not take the case from the jury, under Tennessee procedure.

Looking for that interpretation, what evidence should be submitted to the jury, we find the case of *Lavender* v. *Kurn* (March 1946) 327 U. S. 645, 66 S. Ct. 740. This case is one where the Supreme Court of Missouri reversed a decision of the trial court on the ground that the evidence was insufficient to go to the jury. On certiorari the decision of the trial court was reinstated, the Supreme Court saying:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

We regard this as practically the same rule as adopted in the case of *Osborne* v. *City of Nashville*, 182 Tenn. 197, 185 S. W. (2d) 510, which is cited in the opinion of the Court of Appeals.

The argument of Petitioners that because the Respondent only introduced proof, the case should have been decided by the trial court as the facts were uncontradicted, is erroneous under the rules of either Federal procedures or of this State. In no case can the trial court take a case from the jury if the evidence is such that fairminded men may draw different inferences from it, and in either practice, if the evidence be uncontradictory the court may decide the case only if the party in whose favor the evidence preponderates should move for a directed verdict or the opposing party demurred to the evidence.

In support of this statement, insofar as the State procedure is concerned, see the case of *Hall* v. *Nash* (1947) — Tenn. ——, 198 S. W. (2d) 649; also see 19 Tenn. Law. Rev. 981, a case note wherein the following statement is made:

> "The right to grant a motion for a directed verdict is to be exercised only when, after giving to plaintiff's testimony its full scope and indulging in all favorable and legitimate inferences therefrom, there is no substantial evidence to support a verdict for the plaintiff. A prayer for a directed verdict for the defendant for want of evidence supporting plaintiff's case must be rejected if a rational mind could find for plaintiff under the evidence. Where there is any credible evidence supporting an inference, the question as to what is the proper inference to be drawn therefrom is for the jury. Where the evidence will admit of different reasonable inferences, it should be submitted to the jury.
>
> "Indirect and circumstantial evidence of negligence and sufficient proof of other definite facts from which negligence may reasonably be inferred will present a jury question as to negligence, despite lack of positive and direct evidence of an eyewitness. If there was any evidence tending to prove

acts of negligence complained of, the trial judge had a duty to submit question to jury. When more than one rational conclusion can be drawn from evidence by reasonable men, the question of contributory negligence is one of fact and not of law."

See also Federal Rules of Civil Procedure, Rule 50.

Blair v. *B. & O. R. Co.*, (January 1943) 323 U. S. 600, 65 S. Ct. 545, said:

"To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief Congress afforded them."

Tiller v. *Atlantic Coast Line R. Co.* (February 1943) 318 U. S. 54, 65 S. Ct. 444, 451 (Headnote 10):

"No case is to be withheld from a jury on any theory of assumption of risk, and questions of negligence should under proper charge from the court be submitted to the jury for their determination."

The foregoing case also holds the 1939 Amendment to the Federal Employers' Liability Act completely obliterated the doctrine of assumption of risk, and no doctrine of non-negligence would be substituted for it.

Therefore, under these cases we say that the procedure in either State or Federal Court requires the submission of the case to the jury on the evidence. From a procedural standpoint the court could not take the case from the jury as Respondent did not move for a directed verdict in his favor, nor waive his demand that the jury try the issues.

Respondent When Injured Was An Employee

Respondent was an employee at the time of his injury as he was engaged in acts incidental to his employment. Respondent was injured on the premises of the employer, subject to employer's control, where he had a contractual right to be and to receive a benefit, namely, a place to sleep. He was injured by an instrumentality furnished by the employer and the risk arose by reason of the peculiar conditions of the employment, imposed by the demands of the employer upon the railroad "extra gang" employees.

As heretofore stated, "employer" and "employee" are used in the Federal Employers' Liability Act in their natural sense, and as all employees are covered by the Act if any portion of their duties in any way directly or closely and substantially affect interstate commerce, it is now necessary to determine whether or not Respondent was an "employee" * * * as used in its natural sense * * * at the time of the injury.

As a general statement we find in 36 A. L. R. 906:

> "It is uniformly held that the relation of master and servant is not interrupted by the end of actual working hours, but continues so long as the employee is on the employer's premises and engaged in actual or incidental duties of his employment or subject to the employer's control."

The foregoing citation covers cases from nineteen jurisdictions and the Federal Courts of the United States, as supporting the foregoing statement. Also there are several cases we believe sufficiently in point to be further digested as they deal with factual situations similar to the case at bar:

Orman v. *Salvo* (C. C. A.) 117 F. 223, an employee in a railroad construction camp, asleep in a tent furnished by his employer, was injured by a rock thrown upon the tent

by the blasting during the progress of the work. Employee was allowed to recover for his injuries. The Court said:

> "The master, who had furnished him this lodging, located at a place made dangerous by the discharging of blasts in conducting the master's business, owed him the duty of giving him timely warning, to enable him to avoid the danger."

Moore v. *Minneapolis & St. L. R. Co.* 123 Minn., 191, 142 N. W. 152, 154: It is held a brakeman may recover for injuries sustained in railroad yards while on his way to get his evening meal. He had remained in the caboose to sleep, although off duty until called for his next run. The Court said:

> "There was clearly an invitation to the men to use this car for sleeping purposes as an incident to their employment. In such case they are employees while upon said car and necessarily going to and from the same."

Moyse v. *Northern P. R. Co.* 41 Mont. 272, 108 P. 1062: A freight conductor off duty, but required to be within call, went to sleep in a caboose in the railroad yards. He was injured because the brakes on the caboose were not set properly and it rolled into an excavation. The Court held that as he was to be within call, he was therefore in the discharge of his duty; and that the defendant was required to use ordinary care to furnish a reasonably safe place for the use of the plaintiff and to maintain it in that condition. Recovery allowed under common law but not Federal Employers' Liability Act, as his services "at the time of the injury" were not interstate. Case was decided before 1939 Amendment.

St. Louis A. & T. R. Co. v. *Welch,* 72 Tex 296, 10 S. W. 529: A foreman of a bridge repair gang was sleeping in a bunk

car which was struck by a train, injuring foreman. Foreman was subject to orders to go out on duty at any time. The Court held that the plaintiff was a fellow servant of the employer, the Court saying:

> "We think he must be held to have been upon duty at the time he received the injury. That he was resting from his labors, we think makes no difference."

International & G. N. R. Co. v. *Ryan*, 22 Tex. 565, 18 S. W. 219, 221: Bridge repair gang carpenter off duty was sitting in his bunk car writing a letter at night. He paid 66-2/3 cents per day for board. The car was run into by a switch engine and he was injured. The Court held that the plaintiff and employees in charge of the engine were fellow servants, saying:

> "He was, in contemplation of law, in the employment of the company at the time of the collision. His presence in the car on the sidetrack at the time of the collision can be explained in no other way under the proof. It was only by reason of the fact that he was an employee of the company that he was in the car on the sidetrack at the time he was injured."

Ill. Cent. R. Co. v. *Panebiano*, 129 Ill. App. 1: A track repair gang lived, ate, cooked, and slept in boarding-cars, which were provided by appellant for that purpose. The men furnished and cooked their own provisions, and appellant had no connection therewith. Appellee was ill and did not go to work. In the afternoon he prepared to bake bread, and about four o'clock he put his dough upon a board, got out of the car on the west side and started under the car with the dough, intending to go to the oven and bake it. A switch

engine struck the car, injuring plaintiff. Plaintiff sued, recovered, and defendant appealed. The Court said:

> "There is no merit in the contention that appellee was not in the employ of the appellant because he happened not to be working that day. *Heldmair* v. *Cobbs*, 195 Ill. 172 (62 N. E. 853). He was in the regular employ of appellant; was paid monthly when the pay-car came along; and was furnished by appellant with a car in which to cook, eat, sleep, and live for months at a time. The relation of employer and employee, and the right of appellee to occupy the car did not cease because of his temporary absence from work on account of his illness. * * * The company furnished these cars in which the men should sleep, and stoves upon which they should cook, and dishes for their table, and a foreman who lived with them, and *we consider it altogether too narrow a construction for the relations between appellee and appellant to say that it had no responsibility for or control over the men except during the hours when they had shovels, picks, and spades in their hands.*"

Considering these cases, it is clear that under these cases *the relation of "employer" and "employee" is not terminated or interrupted so long as the employee is on the employer's premises, within the express or implied contract of employment, and exposed to dangers incidental to the employment, or is engaged in any act which is actual/or incidental to the duties of his employment or subject to the employer's control.*

Respondent was employed; never discharged; was in the shanty car where his contract of employment provided he was to sleep, which was a benefit of his contract of employment; was on the premises of employer, within the control

of the employer, and subject to call at any time; and Respondent was exposed to a danger incidental to his work by sleeping in an unsafe place provided by his employer; and the Respondent had not been discharged, and employer knew Respondent was in the shanty car. We respectfully insist that the Respondent was an employee of Petitioners when injured.

Petitioners cited three cases dealing with decisions of the Tennessee Court under Workmen's Compensation decisions. Each was not in point because the employee was off the premises of the employer and injured by negligence of his own, or a third party, and not by the negligence of the employer. However, most of the modern decisions touching the relation of "employee" and "employer" now arise under these Acts, and an examination of some of these cases if informative as "employee" as used in the Acts refers to the common law or general relations of "employer" and "employee." Recovery can be allowed only where employee is such when injured, and the injury *arises out of and in the course of employment.*

Exhaustive annotations dealing with the injury to servants who live on employer's premises as a part of their contract of employment, under Workmen's Compensation Acts are digested in:

31 A.L.R. 1251
56 A.L.R. 512
158 A.L.R. 607

In all of these annotations it is stated that the general rule is:

> "Injuries to employees living on the employer's premises, reasonably attributable or incidental to the nature of his employment, or the conditions un-

der which he lives in carrying on his employment, have been held to be within Compensation Acts as arising out of and in the course of employment."

31 A. L. R. 1251-53.

"Such accidents have also frequently happened to workmen living at bunk houses, cabins, and tents, that have been provided by their employers, and the test as to whether they are entitled to compensation has generally been whether they were reasonably required or expected to do what they were doing at the time of the accident."

31 A. L. R. 1254.

The Tennessee Courts follow this rule.

Employer's Liability Assurance v. *Warren*, 172 Tenn. 403, 112 S. W. (2d) 837:

"It overlooks the facts that it was necessarily within the contemplation of the parties, his employer and himself, that there would be periods of rest and times for food and sleep, from day to day, as essential incidents of his occupation. * * * The *yardstick of the contractual service of the employee measures alike the contractual obligation of the employer for compensation.*"

Carter v. *Hodges*, (1939) 175 Tenn. 96, 132 S. W. (2d) 211:

"Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense (these) acts

contribute to the furtherance of his work. That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment."

Vaughn v. *Standard Surety & Casualty Co.* (1944) 27 Tenn. App. 671; 184 S. W. (2d) 556:

> "While no express contract for transportation was made with complainant, there was testimony that he knew and expected that he would be transported by his employer in these trucks from McMinnville in the morning to the job where he would work, and from the job in the afternoon back to McMinnville."
>
> "It is not reasonable to suppose that the contracting parties would contemplate that these men would be carried in trucks a distance of fifty or sixty miles from McMinnville and not returned after the day's work was done. It is true that complainant did not have to avail himself of this means of transportation, but as an actual fact he did avail himself of it."

A person to be within the provisions of the Workmen's Compensation Act of Tennessee must be employed, either by express or implied contract.

> *Cornett* v. *Chattanooga*, 165 Tenn. 563, 56 S. W. (2d) 742.

The contract of the master and servant may be expressed or implied in fact, as shown by a course of dealing between the parties. Where it is apparent to reasonable minds that the employees would be expected or required to do the act

they have done, or that such service was common and necessary by the employer, then such is an implied part of their contract and properly to be said to have been intended by the parties.

It thus appears that the courts have held under the common law and under the Workmen's Compensation Act that an employee who receives lodging, board, and/or other services as a part of his contract of employment, or whose contract of employment exposes the employee, at all times during his employment, to peculiar risks, is within the scope of his employment during such time as he is receiving the board, room, lodging, and/or other services or at such times as he is exposed to risks reasonably attributable to and incidental to his employment.

In citing the cases of the Federal Courts dealing with employment situations somewhat similar to the case at bar, it is to be expected that those courts have applied the above principles of common law to the words "employer" and "employee." However, these cases, before the 1939 Amendment to the Federal Employers' Liability Act, are often limited to the determination of the existence of "*employee engaged in interstate commerce*" instead of "*employee.*"

A general statement of the rule of the Federal Courts prior to the 1939 Amendment is found in *Early* v. *Va. Ry. Co.* 130 Fed. (2d) 548, where the Court said:

> "• • • the scope of the employment includes not only actual service, but also those things necessarily incident thereto • • •".

Philadelphia, B. & W. R. Co. v. *Smith* 250 U. S. 101, 39 S. Ct. 396, 63 L. Ed. 869: The Court held that the Federal Act covered a cook on a repair gang who was neither engaged

in repairing the track nor carrying material for that purpose. The Court said:

> "The work of the bridge carpenters in the present case was so clearly related to defendant's interstate commerce as to be in effect part of it. The next question is what was plaintiff's relation to the bridge carpenters: It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed in any sense a participant in their work. * * * *The significant thing in our opinion is that he was employed by the defendant to assist, and actually was assisting the work of the bridge carpenters by keeping their bed and board close to their work,* thus rendering it easier for defendant to maintain a proper organization of the bridge gang and *forwarding their work by reducing the time lost in going to and from meals and their lodging place.*

Brown's Administrator v. *N. & W. R. Co.* 12 F. (2d) 319, 321, 12 F. (2d) 319.

Brook v. *Chicago R. I. & P. R. Co.* 305 Mo. 502, 266 S. W. 691, 36 A. L. R. 891; Cert. Den. 266 U. S. 634, 45 S. Ct. 226, 69 L. Ed. 479: A gang of men living in bunk cars were engaged in repairing a telephone line and had come back to the cars to eat the noon meal. Brook was injured while going across yards for a bucket of water. Recovery allowed under Federal Employers' Liability Act. The Court said:

> "The procuring of water and taking of the meal at the time and place under the circumstances and under the method in force were ancillary to the work done."

Chicago, M. St. P. & P. Co. v. *Kane,* (9 CCA) 33 F. (2d) 866: Here we find a case decided before the 1939 Amendment which dealt with the rights of a section hand at the bunk cars. It seems necessary to us to quote extensively from this case as it is a case decided by Federal Court and a case which is somewhat similar to the facts, and on pages 867-68 the Court said:

> "Inasmuch as there is no exact formula to which the first question can be referred, and every case must be adjudged upon its own facts (*Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366, 30 A. L. R. 532), it is necessary to state in some detail the circumstances. The accident happened at about 6:30 in the morning. Alcazer is not a town or village, but a remote railroad station, where there are side and passing tracks and a section house. From this point appellant was working an extra gang of approximately 120 men in surfacing and dressing its roadbed. *There being no local facilities for boarding and housing the men, provision was made therefor in movable dining and bunk cars, which were set on a side track at the station, and meals were furnished therein by a commissary concern under contract with appellant, by the terms of which the men were to be charged at a specific rate, and at that rate deductions were to be made from their checks and paid to the commissary. There is no question that the track upon which work was being done was a facility of interstate commerce, and indeed, appellant concedes that, had Kane actually entered upon the work prior to the accident, he would have been within the protection of the Liability Act.* It seems that appellant was adding to the gang from day to day men secured through its employment *agencies, and Kane had been so engaged by its agent at Butte.*

"In charge and under the control of one of appellant's agents *he, with* five or six others employed in like manner, *was taken on board one of appellant's passenger trains,* and without charge was carried to Alcazer, *reaching his destination sometime in the evening of September* 14th. Being advised that six or seven men were being sent for this service, the foreman of the gang was at the station to meet them upon the arrival of the train. They were directed to get off and carry some camp supplies which had come in on the train, to the commissary. *Then all were immediately issued blankets and were assigned to their bunks.* Apparently both the commissary steward and the night foreman participated in giving these orders and making these assignments. The men were informed of the breakfast hour about 6:45, and that they were to go to work at 8 o'clock. Across three tracks, upon the other side of the yard from the bunk and dining cars, were the section house, the water supply, and all toilet facilities. *Just before the breakfast hour, Kane was struck and killed while he was walking across these tracks in an "angling" direction from the bunk cars for the purpose of going to the toilet.* Undoubtedly he was in appellant's employ, and his service was interstate. By the conditions of his employment, he was necessarily on appellant's premises, and was making necessary preparations for the work in which he was to be engaged an hour and a half later, in a reasonable manner and within a reasonable time. *Appellant's contentions seem to be predicated solely upon the consideration that he had not yet lifted a pick or stuck a shovel into the ground.* But his employment was definite, and the nature and place of his service for the day were clearly understood. True, the gang foreman might have discharged him before he did any actual work, or might have assigned him to a different kind of

work, but such authority with respect to the future he would have at any time over any one of the men, regardless of the length of service of such man in the past.

"In contemplation of law, we are of the opinion that, within the principle recognized by us in *Lamphere* v. *Oregon R. & N. Co.* (CCA) 196 F. 336, 47 L. R. A. (N.S.) 1; and *San Pedro, etc.*, v. *Davide* (C.C.A.) 210 F. 870; Deceased was employed in interstate commerce at the time of the accident. In support of this decision we may also cite *Missouri, K. & T. Ry. Co.* v *United States*, 231 U S. 112, 34 S. Ct. 26, 58 L. Ed. 144; *Pederson* v. *Lackawanna & Western Ry. Co.*, 57 L. Ed. 1125. (Case here cites many other cases.) Appellant cites numerous decisions, but we do not find any of them necessarily opposed to the view we have taken. Perhaps those most nearly in point are *Ill. Cent. R. Co.* v. *Welch*, 242 U. S. 303, 37 S. Ct. 116, 61 L. Ed. 319. They both involved the nice distinctions which must often be made where the injured party is engaged in work which may have to do one moment with intrastate and the next with interstate commerce. *But Kane's service was by both parties understood to be in interstate commerce, and nothing else.* (Italics ours.)

As this case indicates, before the Amendment of 1939 to the Federal Employers' Liability Act, where the employee's duties were solely in interstate commerce, according to the agreement of employment, then all incidents of the employment were covered by the Federal Employers' Liability Act. One of these incidents was this danger to which deceased Kane was exposed. True, Kane never actually engaged in any act of his employment, but he was killed by a danger of his employment while receiving a benefit of his contract of employment on the premises of the employer.

In connection with this last statement, which relates to receiving services from the employer, which services were an incident of the contract of employment, and a part of the contract of employment, we find a case decided in March, 1946: *Northwestern P. R. Co.* v. *Industrial Accident Commission* —— Cal. ———, 166 P. (2d) 334, where the railroad brakeman died in an automobile collision. There was a recovery by administrator of deceased employee under the California Compensation Act, which railroad sought to set aside because the deceased was alleged to be in interstate commerce, and, if so, the Federal Employers' Liability Act applied. Held, the award is vacated. The Court said:

> "Said transportation was furnished to the employee by employer as part of the contract of hire and was under the control of the employer and therefore, while using it, the said employee was performing a service in the course of his employment, and said injury arose out of and in the course of the employment."

Therefore, in both State and Federal Courts, (*Kane case and N. W. R. Co.* v. *Inc. Accid. Conn. supra*) *it is held that where the services of the employee are wholly in interstate commerce,* even before the 1939 Amendment, *where the employee is on the premises of the employer and is exposed to danger from the employer while receiving a benefit of his contract of employment the employee is within the coverage of the Federal Employers' Liability Act.*

REPLY TO SPECIFICATION OF ERROR No. 3

Angelo Jackson Was A Fellow Servant At The Time Respondent Was Injured

Argument is made that Angelo Jackson was not a fellow servant. Suffice it to say, this Record shows he lived near Respondent's home at Union Mills, North Carolina, worked at the same job for Petitioners on the same extra gang, under the same contract of employment with the Petitioners, and was assigned a bunk in the same car with Respondent by Petitioners. Briefly, we would say that Angelo Jackson was as much an employee as Respondent. The negligence of Angelo Jackson probably combined with the other negligence of Petitioners, but as said in *Tiller* v. *Atlantic Coast Lines R. Co.* (Feb. 1943) 319 U. S. 54, 63 S. Ct. 444, 446-7:

> *"We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the* 1939 *Amendment, and that Congress by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to "non-negligence."*

Wherefore, whether he be called fellow servant or not, and we feel he is, the negligence of the Petitioners was the cause of Respondent's injury, and Jackson's technical association with Petitioners and the Respondent need not be further argued, as Jackson certainly was not the sole cause of Respondent's injury.

Therefore, we finally come to the only real question: Has the proof, introduced by the Respondent, any probative value, and could reasonable men believe, from this proof, that the Respondent was upon the premises of the employer,

receiving a benefit of his contract of employment, exposed to a danger of this type of employment from negligence of his employer, subject to control of the employer and within the control of the employer, and was this an incident of the contract of employment between employer and employee?

On motion for a directed verdict the trial court said:

> "But it is my opinion that he was in this car, a place where he had the right to sleep, and that it was directly connected with his employment and was incident to his employment; and that this litigation should be proceeded under the Interstate Commerce Act." (R. 70-71)

On appeal, the Court of Appeals, after a full and careful consideration of the facts, said:

> "On the record before us it is shown without contradiction that the place of abode was furnished by the railroad, on their premises, so that they might have the services of these laborers; that it was within the contemplation and undoubtedly of the employer and employee that the employee use this place of abode even though no work was to be done the day following; that these employees were subject to call for work of the employer during the night when they were not in actual service; that it was necessarily incident to the employment to furnish this place because these laborers were recruited from various states and to keep them on the job, a place of abode was provided. It is clearly inferable that on the night of the accident herein, i. e., if the accident had not happened, the plaintiff could have been called to work by the employer if necessity demanded. The instrumentality that caused the injury was furnished by the employer for use of the employees. There is nothing herein to indicate that what the plaintiff did was inconsistent with his duty

> to his employer. It seems apparent that there was material evidence presented to the jury wherein they could find that the relation of employer and employee, or master and servant, existed between the parties at the time of the injury. See 4 Labatts Master & Servant, 4684, section 1556; *Milburn* v. *Chicago M. St. P. & P. Co.* 331 Mo. 1171, 56 S. W. (2d) 80, 69, and authorities there cited." (R. 87)

On petition for Certiorari the Supreme Court of Tennessee said:

> "We are of the opinion that Meeks was an employee of the defendants at the time of the injury, as he was engaged in acts incidental to his employment. He was injured on the premises of the employer and subject to the employer's control, where he had a contractural right to be and receive a benefit, namely, a place to sleep. He was injured by an instrument furnished by the employer, and the risk arose by reason of the peculiar conditions of the employment imposed by the employer; and, further, he was subject to call at any time in case of an emergency or for extra repairs on the tracks of the railroad." (R. 99)

The proof in the case has been held by three courts to show these facts. Probably more conclusions and deductions could be drawn than have been set out, but all inferences, deductions, speculations or conjectures are to be by the triers of fact. *Lavender* v. *Kurn, supra, Hall* v. *Nash, supra;* and *Gulf Ref. Co.* v. *Huffman, supra.* If the trial court did not err in overruling the motion of defendant for a directed verdict, then there can be no merit in this petition for Certiorari.

REPLY TO SPECIFICATION OF ERROR NO. 4

It is urged that the Tennessee Courts erred in allowing the suit filed by Respondent under the Tennessee Compensation Acts to be heard by the trial Judge, while the other cause, filed by Respondent under the Federal Employers' Liability Act, was being heard.

This is a matter of Tennessee State practice and procedure which has been approved by the Court of Appeals and the Supreme Court in that jurisdiction.

(R. 82; and R. 95)

We respectfully submit that although the action is based upon the Federal Statute, local rules of practice and procedure are applicable where it is triable and tried in a State Court.

Chesapeake & O. R. Co. v. *DeAtley* (1916) 241 U. S. 310, 60 L. Ed. 1016, 36 S Ct. 564. 12 A. L. R., 715.

Therefore, in our opinion, this argument is not well taken and this specification of error should be overruled and disallowed.

CRITICISM OF CASES CITED BY PETITIONERS.

Considering the cases cited by the Petitioners to sustain their contentions, we feel that, generally speaking, all Federal cases cited by Petitioners were decided prior to the 1939 Amendment, and turned primarily not upon whether the injured was an "employee" but upon whether, as such employee, he was engaged in interstate commerce at the time he was injured. With due deference we herewith submit

the cases relied upon are subject to be distinguished from the case at bar for the following reasons:

The case of *Bourne* v. *So. R. Co.* 225 N. C. 43, 33 S. E. (2d) 239, turns upon the proposition that the engineer who was killed had a special written permit to ride an engine on another division, for his own purpose. The regular engineer, in absolute and known violation of the rules of the railroad, turned the engine which he was driving over to the deceased engineer, and the regular engineer, also in violation of the rules of the road, went back into the train. Due to deceased engineer's ignorance of the road and negligence in the management of the engine, the deceased engineer caused the wreck in which he was killed. Therefore, that case has no relation to the facts of the case before the Court. Certainly as the deceased was on a permit which was written, and was to receive no pay, it was not a part of his employment. Bourne killed himself. The Bourne case may be sound on its facts. However, its facts and the law applicable to them do not fit the case at bar.

The case of *Pryor* v. *Bishop* (1916) 234 Fed. Rep. 9, 14-15, was decided prior to the 1939 Amendment and turns upon the fact that the employee was not in interstate commerce:

> "If, however, he could be deemed to be in the employment of the company at the time of the injury, nevertheless he was not then actually employed in interstate commerce."

On the second appeal in 1920, *Bishop* v. *Delano* 265 Fed. Rep. 263, the facts certainly were not different. Even though he was an employee, he was not in interstate commerce.

In the quotation from the *Pryor* v. *Bishop* case, *supra*, and in the second appeal, *Bishop* v. *Denalo*, there are statements to the effect that the employee stayed in the caboose at the

turn-around point, and employee knew he could stay there if he so chose, but there was no contractual right in the employee nor duty upon him to stay there. *Pryor* v. *Bishop, supra,* refers with approval to a "Moyse" case, decided before the 1939 Amendment, which is the case of *Moyse* v. *Northern P. R. Co.,* 41 Mont. 272, 100 P. 1062 wherein employee, a freight conductor, was off duty, but required to be within call, and he went to sleep in a caboose parked in the yards. He was injured because the brakes on the caboose were not properly set and it rolled into an excavation. Suit was brought on common law and Federal Employers' Liability Act counts. The Court held that as he was to be within call, he was within the discharge of a duty of his employment, and employee was allowed to recover under the common law, but not under Federal Employers' Liability Act, for though an employee, he was not actively in interstate commerce at the time of his injury. We cited the Moyse case in our Brief to the Court of Appeals.

The Bishop cases, *supra,* are not authority for the position taken by Petitioners that a man is only an employee while using a pick and shovel. The argument of the Petitioners that the Respondent "could stay in the shanty car if he wanted to", is not correct as it insinuates a permissive right. The Respondent proved his right was a contractural right, and that, as a necessity of the employment, he had to stay a long distance from home and stay in a car which could be moved up and down the railroad, and that it was a part of the contract of employment that he sleep in these cars and stay in them, except as at such times as he went home.

(R. 42-44, Q. 17-48; R. 49-51, Q. 105-137; R. 53-54, Q. 170-184).

The case of *Young* v. *N. Y. N. H. & H. R. Co.*, 74 Fed. Rep. (2d) 253, was decided prior to the 1939 Amendment turns upon the question that the Court held all incidents of the injured employee's connection with interstate commerce ended when he reached the point where the fireman should have left the property and cars of the defendant railroad at New Haven. The Court held that a trip to Cedar Hill, some miles from New Haven, was on a mission of his own and not an interstate incident of his employment. The injury occurred on this additional trip.

Karysaik v. *Penn. R. R. Co.* 270 Fed. 738, is a case which turns upon the employee taking a way of convenience from his place of work instead of following the path provided by the employer. Employee was also on his way to his own home.

Brown v. *Pere Marquette R. Co.* 237 Mich 530, 213 N. E. 179, 71 A. L. R. 854 In this case the judgment of the Court was influenced by the fact that the employee was not contributing to interstate commerce Also the employee had stopped the train in a position of danger and refused to put it on a sidetrack because the employee took the position that the time for him to work had expired. Had the employee put the train on the sidetrack, as he probably should have, instead of leaving it on the mail track, the accident would not have occurred.

The citation in 35 Amer. Jur. Sec. 440, page 855, is probably true prior to the Amendment to the Federal Employers' Liability Act. However, as it is no longer material what the employee is doing at the time he is injured by the negligence of the employer or its agents, etc., we would question this authority if the employment contemplated such employees should enjoy this facility at the turn-around point.

The cases of *Little* v. *Johnson City F. & M. Co.*, 158 Tenn. 102, and *Rourke Claimant* —— Mass. ——, 129 N. E. 603, 13 A. L. R. 546, present cases where the employee was injured by a third party away from the place of employment. In the Tennessee case the employee was run over by a car 1,000 feet from his place of employment. In the Rourke case a third party assaulted employee on the street after he had left his place of employment. Therefore, neither is in point.

The case of *Free* v. *Indemnity Ins. Co. of North America*, 177 Tenn. 287, 145 S. W. (2d) 1026, is a case where employee left place of employment to go get groceries. After he purchased groceries, he intended to do a mission for employer. He fell on ice before he reached grocery store. Held, while on way to store he was not in scope of employment. Had he fallen after he left grocery store and returned to his employer's business, he would have been covered by Workmen's Compensation Act.

Toombs v. *Liberty Mutual Ins. Co.* 173 Tenn. 38, 114 S. W. (2d) 785, is a case where claimant was injured off premises of employer on a mission of his own.

In these Tennessee cases, cited by Petitioners, the injury came from a source separate entirely from the employer, and was not caused by employer's negligence nor upon employer's premises; also the employee was not where employer directed him to be, nor receiving of the employer a benefit of the contract of employment; nor was employee subject to control, nor was employee exposed to the particular risk as an incident of his employment.

Petitioners also cite the case of *Brown's Adm'r.* v. *N. & W. Ry. Co.* 12 Fed. Rep. (2d) 319. This is a district court case which was cited by us in our Brief in the Court of Appeals. The holding of this case really appears to be damaging to Petitioners' position. The distinction stated is made be-

tween the Zachary and Karysiak cases, but the Court then said:

> "While the fact that Brown took with him a sack and had put in it a bushel or more of coal affords ground for reasonable inference he was getting coal for use in the kitchen and dining cars, I do not believe the possibility that he was getting the coal for his private use in the bunk car is here of importance. Even if such was his purpose the Zachard case seems to me to control. Brown was employed in interstate commerce, while getting coal for his own use, as much as Zachary's decedent was while going to his boarding house for his own purposes. *Brown's visit to the coal car was not inconsistent with his duty to leave Flat Top on the camp train with the rest of the mason's crew, whether he was after coal for company use or for his own use.*"

CONCLUSION

It is, therefore, submitted that the petition for Certiorari filed in this cause should be denied:

1. Because the Petitioners have not complied with Rule 38, Sec. 1, of the Court, as they did not present the full proceedings in the Court of Appeals of Tennessee.

2. Because the Petitioners have not complied with Rule 38, Sec. 2, and Rule 12, Sec. 1, of the Court, and do not show how the alleged questions were presented in the Appellate Courts of Tennessee, when they were raised, and the position the Petitioners urged upon that Court.

3. Because there was material evidence showing that the Respondent was an employee of Petitioners, and Respondent's duties directly furthered and pertained to interstate commerce, and he was injured by the negligence of the Petitioners.

4. The trial court did not err in submitting the case the jury.

5. Respondent was injured by the negligence of Petitioners and that of a fellow servant, Angelo Jackson. Whether Angelo Jackson was a fellow servant or not is really immaterial as there was active negligence by the Petitioners, combined with the act of Angelo Jackson.

6. The matter of procedure raised by Specifications of Error No. 4 is a matter of State procedure, and is not substantive law.

7. Petitioners have not briefed Specifications of Error Nos. 5 and 6, and therefore they are presumed to be waived and for this reason Respondent has not attempted to brief same.

We, therefore, respectfully submit that each and all of the Specifications of Error made by the Petitioners, are not well taken, and the petition for Certiorari should be dismissed and disallowed, and this action we respectfully request of the Court.

Respectfully submitted,

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